Are Rifle Shot Transition Rules and Other Ad Hoc Tax Legislation Constitutional?*

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I. Introduction

According to the Senate Finance Committee, the Tax Reform Act of 1986[1] contained over 650 so-called rifle shot transition rules, with a total revenue cost of $10.6 billion.[2] A rifle shot transition rule grants transi-

* This article is, in some sense, a companion to an earlier article, Zelenak, Should Courts Require the Internal Revenue Service to be Consistent?, 40 Tax L. Rev. 411 (1985). That article considered whether administrative law limits the ability of the Internal Revenue Service to treat similarly situated taxpayers differently. This article considers whether the Constitution limits the ability of Congress to treat similarly situated taxpayers differently.

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1 Pub. L. No. 99-514, 100 Stat. 2085 [hereinafter the 1986 Act].

2 The Senate Finance Committee's list of transition rules, including beneficiaries and revenue costs, is reproduced at 33 Tax Notes 75-81 (1986), and at 132 Cong. Rec. S13,911-16 (daily ed. Sept. 27, 1986). Senator Packwood, chairman of the Finance Committee, stated that the total revenue cost of the transition rules was $10.6 billion. 132 Cong. Rec. S13,872 (daily ed. Sept. 27, 1986). According to the *Philadelphia Inquirer*, the real number of beneficiaries of the Act's rifle shot transition rules is much higher than 650, and the real revenue cost may be two or three times the official estimate. Green, Philadelphia Inquirer, Sept. 27, 1986, at A8, col. 5.

tional relief from the repeal of a favorable provision of the tax laws, but it is drafted so narrowly that only one taxpayer (or, in some cases, a very few taxpayers) qualifies for the relief. The phenomenon of a provision granting special tax relief to a single taxpayer—either on a transitional basis or permanently—did not originate with the 1986 Act. The 1986 Act was unprecedented, however, in the number of these provisions and in their revenue cost.

The topic of this article is the constitutionality of such special, or ad hoc, tax provisions. (Because the same constitutional questions are raised whether the special relief is transitional or permanent, this article will generally refer to the rules in question as ad hoc tax provisions,[3] rather than rifle shot transition rules.) These rules may be vulnerable to challenge under both the equal protection component of the due process clause of the fifth amendment and the tax uniformity clause of article I, § 8, clause 1. In fact, a suit has been filed in the United States District Court for the Northern Division of Texas, challenging the constitutionality of the 1986 Act on those grounds, and the court has issued an opinion in the case.[4] This article evaluates the strength of the constitutional challenges, considering both the merits of the claims and obstacles that might prevent a court from reaching the merits. It concludes that, although neither challenge is frivolous, it is probable that ad hoc tax provisions will survive both challenges. Before analyzing the constitutional issues, however, a brief description of ad hoc tax provisions is in order.

II. Ad Hoc Tax Provisions: A Primer

Perhaps the most famous ad hoc tax provision was § 1240 of the Internal Revenue Code of 1954, also known as the Louis B. Mayer amendment. The section provided that a lump-sum distribution received by an employee from his employer upon retirement would be taxed at capital gains rates, but only under extremely narrow circumstances.[5] The terms of the statute were tailored to the needs of Mayer, the retiring head of

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[3] This terminology comes from Note, Tax Equity and Ad Hoc Tax Legislation, 84 Harv. L. Rev. 640 (1971).

[4] Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285 (N.D. Tex. 1988). The court held that the challenged transition rules did not violate the tax uniformity clause, and ordered the parties to present evidence concerning whether the challenged rules satisfied the equal protection requirement of being rationally related to the accomplishment of a legitimate governmental purpose. The court's analysis of the various issues is discussed in notes 123, 150, 239, 252, 253, 265, and text accompanying notes 269-285. The issues raised by *Apache Bend* are briefly discussed in Doti, Constitutionality of the 1986 Tax Reform Act Transition Rules, 15 W. St. U.L. Rev. 81 (1987).

[5] The statute required that (1) the distribution resulted from the employee's assignment or release of the right to receive a share of his employer's profits for a period of at least 5 years after his retirement; (2) the employee had worked for the employer for more than 20 years; (3) the employee had held the rights for at least 12 years; (4) the rights had existed before August

Metro-Goldwyn-Mayer studio,[6] and saved him about $2 million in taxes.[7] The Mayer amendment was typical of most ad hoc tax legislation, in that it did not name its beneficiary. Its benefits were available to anyone who met its requirements, but those requirements were so restrictive that probably no other taxpayer would ever qualify.[8] Also typical of ad hoc provisions was the fact that there was no apparent policy rationale for the restrictions, other than the desire to benefit only one lucky taxpayer.[9] Prior to the 1986 Act, ad hoc provisions were a regular, and regularly deplored, part of tax legislation.[10] There was nothing to compare, however, with the 1986 Act's hundreds of ad hoc provisions and their billions of dollars of revenue loss. What accounted for the explosion of ad hoc provisions in 1986?

Much of the explanation lies in the nature of the 1986 Act's reforms. In order to lower tax rates without reducing tax revenue, the Act had to eliminate many favorable tax provisions. For every eliminated tax benefit, there were taxpayers who could make plausible claims for transitional relief because they had planned in reliance on the continuation of the benefit provision. In some cases, Congress responded to these claims with generic transition rules, equally available to all similarly situated

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16, 1954; and (5) the entire consideration for the assignment or release of the rights had been received in a single taxable year.

[6] The provision is discussed in P. Stern, The Great Treasury Raid 44-45 (1964); Cary, Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws, 68 Harv. L. Rev. 745, 747-49 (1955); Surrey, The Congress and the Tax Lobbyist—How Special Tax Provisions Get Enacted, 70 Harv. L. Rev. 1145, 1147 n.4 (1957).

[7] Surrey, note 6, at 1147 n.4.

[8] Miracles do happen, however. *Forbes* reported that in 1966 Bernard Kilgore of Dow Jones retired and was able to qualify his lump-sum settlement for capital gains treatment under the Mayer amendment. Saunders, Personalized Taxes, Forbes, June 1, 1987, at 86. For another example of an unintended beneficiary of an ad hoc provision, this one in connection with the 1986 Act, see J. Birnbaum & A. Murray, Showdown at Gucci Gulch 290-91 (1987).

[9] The vast majority of the ad hoc provisions of the 1986 Act continued in the tradition of describing, rather than naming, their beneficiaries, often in terms offering little or no apparent policy justification. To take two examples from the literally hundreds available, a provision granting special treatment to supporters of the athletic programs of the University of Texas and Louisiana State University described one university as "mandated by a State constitution in 1876, . . . established by a State legislature in March 1881, . . . located in a State capital pursuant to a statewide election in September 1981, . . . [having a] campus . . . formally opened on September 15, 1883, and . . . operated under the authority of a 9-member board of regents appointed by the governor." The other university was described as having a stadium "the plans for renovation of which were approved by a board of supervisors in December 1984, and reaffirmed by such board in December 1985 and January 1986, and . . . the plans for renovation of which were approved by a State board of ethics for public employees in February 1986." The 1986 Act, note 1, § 1608. Senator Russell Long of Louisiana and Rep. J.J. Pickle of Texas reportedly were primarily responsible for the provision. Gutfeld, Athletic Gifts to Universities Arouse the IRS, Wall St. J., Oct. 20, 1986, at 29, col. 2. This ad hoc provision was repealed by of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1016(b), 102 Stat. 3342, 3575.

[10] For examples (and criticisms) of pre-1986 Act ad hoc provisions, see P. Stern, note 6, at 44-61; Surrey, note 6, at 1147-49 n.4, 1176-81; Note, note 3, at 640-53.

taxpayers.[11] But generic relief costs the government much more than narrowly targeted rifle shot relief. Rifle shot transition rules were a cost-effective way of addressing reliance claims of taxpayers with the most effective lobbyists.[12] Accordingly, the Finance Committee's list of transition rules and their beneficiaries includes taxpayers receiving relief from adverse changes in the tax laws relating to (among other things) accelerated depreciation, the investment tax credit, rehabilitation tax credits, the minimum tax, net operating losses, accounting rules, municipal bonds, pensions, and insurance.[13]

The proponents of tax reform were able to use rifle shot rules to build support for the Act. Loyal legislators could be rewarded with rifle shot rules granted at their request, and wavering legislators could be convinced to support the bill by the promise of a few transition rules. The decline in party discipline in Congress in recent years may have encouraged this sort of dealing by giving individual legislators greater independence and bargaining power.[14] According to Jeffrey H. Birnbaum and Alan S. Murray, in their book *Showdown at Gucci Gulch* (a journalistic account of the events leading to the passage of the 1986 Act), the doling out of transition rules by Ways and Means Chairman Daniel Rostenkowski and Finance Chairman Robert Packwood was crucial to the Act's success.[15] It has been reported that Senator Packwood claimed, in defense of the 1986 Act's rifle shot transition rules, that the Act never would have passed without those rules.[16]

There may never be another profusion of ad hoc tax provisions comparable to that of 1986. In April 1988, the *Philadelphia Inquirer* published a seven-part expose of the 1986 Act's ad hoc provisions.[17] The *Inquirer*

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[11] See, e.g., The 1986 Act, note 1, § 203(b)(generic transition rule for modification of the accelerated cost recovery system).

[12] See Jones, The Controversy Over Rifle-Shot Transition Rules, 39 Tax Notes 543, 543-44 (1988) (discussing reasons for the large number of rifle shot transition rules in the 1986 Act, including the act's repeal of many tax benefits and the relatively low revenue cost of rifle-shot relief).

[13] The list is printed in 33 Tax Notes 75-81 (1986).

[14] See Jones, note 12, at 544 (noting that "[t]he rise of the subcommittee system and the subsequent dispersion of power and a more open and visible tax-writing process has led to greater opportunities for lobbyists" to obtain rifle shot rules).

[15] J. Birnbaum & A. Murray, note 8, at 146-47, 240-43. Especially striking is their story of how Senator Packwood had granted an ad hoc rule to Unocal at the request of Senator Pete Wilson, but then managed to have the rule voted down when Wilson crossed him on several votes. Id. at 247.

[16] Press Watch, 39 Tax Notes 779 (1988) (reporting on UPI story dated April 28, 1988). Similarly, Assistant Treasury Secretary J. Roger Mentz commented: " 'A transition rule is a buyout of a particular member for his vote. This is somewhat less than the finest demonstration of democracy in action, but I regard it as the price of reform.' " Sheppard, Law School Conference Examines Tax Reform Policy, 34 Tax Notes 93, 94 (1987).

[17] Barlett & Steele, The Great Tax Giveaway, Philadelphia Inquirer, April 10-16, 1988, at A1, col. 1.

also notified members of the tax committees that it would monitor the progress of the 1988 technical corrections legislation and report on any transition rules.[18] Members of the tax committees received numerous letters critical of the 1986 Act's ad hoc provisions after the *Inquirer* series appeared.[19] A congressional aide commented that "[t]he public outrage directed at committee members has had a profoundly sobering effect."[20]

Congressmen Rostenkowski and John J. Duncan (the ranking Republican member of the Ways and Means Committee) responded to the newspaper's investigation with a letter stating that the technical corrections bill "contains no new transition rules but merely clarifies Congressional intent, or otherwise corrects, the 1986 Tax Reform Act."[21] Senator Bentsen wrote a letter to the same effect.[22] A September 1988 *Inquirer* article reported that, although the technical corrections bill contained 250 transition rules, all but one of those rules were merely clarifications or corrections of the 1986 Act.[23] After passage of the Act, congressional aides gave the *Inquirer* much of the responsibility for the dearth of new ad hoc provisions in the Act.[24] Purely as a political matter, quite apart from questions of constitutionality, the short term prospects for ad hoc tax legislation are not good.

III. The Constitutional Challenges

A. Equal Protection

Although the equal protection guarantee of the fourteenth amendment, by its terms, is a limitation only on the actions of the states, the Supreme Court has held that the due process clause of the fifth amendment imposes equal protection restraints on the federal government as well.[25] The equal protection requirement limits the power of a legislature to treat different groups or persons differently. Statutory classifications based on race are treated as inherently suspect, and are usually held to be

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[18] Jones, Tax Policy Considerations Triumphed in Technical Corrections Bill, Aides Say, 41 Tax Notes 686, 686-87 (1988).

[19] Jones, Press Coverage Has Ways and Means Members Worried About Technical Corrections, 39 Tax Notes 902, 903 (1988).

[20] Id.

[21] Rostenkowski and Duncan Defend Transition Rules in the 1986 Act, 39 Tax Notes 1008 (1988).

[22] Bentsen Promises Report on Transition Rules in Technical Corrections Bill, 39 Tax Notes 1336 (1988).

[23] Barlett & Steele, The Tax-Break Sweepstakes: Who Wins Round 2?, Philadelphia Inquirer, Sept. 25, 1988, at A1, summarized at 41 Tax Notes 235 (1988).

[24] Jones, note 18, at 686-87.

[25] See, e.g., United States v. Kras, 409 U.S. 434 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954).

violative of equal protection.[26] Certain other kinds of classifications, including those based on alienage, gender, and illegitimacy, tend to be viewed by the courts with disfavor, and are often held unconstitutional.[27] Apart from these few categories of disfavored classifications, however, the equal protection standard is very lenient. The so-called rational basis standard requires merely that the statutory classification bear a rational relationship to the purpose for which the statute was enacted: "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."[28]

This requirement of a rational relationship between statutory means and ends necessarily implies some limitation on permissible legislative ends. Otherwise, any statutory classification would satisfy the rational basis test on the grounds that the statute's purpose is to do what it does, and that the classification is the perfect means to achieving that end.[29] Thus, a court could hold that the rational basis standard was not satisfied because the legislature could not legitimately pursue the end to which the statutory classification was rationally related, and that the statute was not rationally related to any end the legislature could legitimately pursue.

Most special tax provisions can be plausibly explained as the result of an exercise of raw political power. That is, taxpayers who are the beneficiaries of special tax provisions may not be more deserving, in any principled way, than other taxpayers; they may simply have more political power. The crucial question in these cases—and in many other rational basis equal protection cases as well—is whether a legislative purpose to accede to pressure from powerful special interests can constitute a legitimate purpose. Can a statutory classification be successfully defended against a rational basis equal protection challenge with the simple explanation that the classification was the result of pressure group politics? If the rational basis equal protection standard is to have any significance,

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[26] Ironically, the Court's first explicit statement that race was a suspect classification for purposes of equal protection analysis appeared in a case in which the Court upheld the constitutionality of the internment of Japanese-Americans during World War II. Korematsu v. United States, 323 U.S. 214, 216 (1944).

[27] See, e.g., Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender); Graham v. Richardson, 403 U.S. 365 (1971) (alienage).

[28] McGowan v. Maryland, 366 U.S. 420, 425 (1961). Similarly, the Court has stated that the rational basis standard is satisfied "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance v. Bradley, 440 U.S. 93, 97 (1979).

[29] Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 229 (1976); Perry, Constitutional "Fairness": Notes on Equal Protection and Due Process, 63 Va. L. Rev. 383, 418 (1977); Sunstein, Public Values, Private Interests, and the Equal Protection Clause, 1982 Sup. Ct. Rev. 127, 130; Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972).

the answer to that question must be "No."[30] If mere response to political pressure is a legitimate purpose, then it is inconceivable that any legislative classification would ever fail to be rationally related to a legitimate purpose.

Some prominent commentators have argued, however, that legislation which simply reflects the outcome of a power struggle among different interest groups is legitimate, and should not be subject to constitutional challenge.[31] In recent decades, the tendency in political science has been to understand the legislative process, not as a disinterested search for the public good, but rather as an unprincipled competition among private interests. The theory of public choice, which applies to the political process the economist's assumption that individuals (including legislators) are motivated primarily by private interest,[32] has been especially prominent.[33] Those who contend that statutory classifications are sufficiently justified as being the outcome of a power struggle among competing private interests, have accepted the private interest view of legislation as not only descriptive, but also normative. Richard Posner, for example, states that "it would be odd, indeed, to condemn as unconstitutional the most characteristic product of a democratic (perhaps of any) political system."[34]

Where the Supreme Court stands on this question is not entirely clear. Since it steadfastly insists that there is a rational basis equal protection requirement, and since such a requirement makes sense only if classifications explicable only as the outcome of pressure group politics are unacceptable, it would seem that the Supreme Court rejects any normative private interest view of politics. On the other hand, the Court's manner of applying the rational basis test to tax and other economic legislation is so deferential that it results in virtually automatic rejection of all rational basis challenges. The Court has been so willing to hypothesize possible public purposes which challenged legislation might serve,[35] and to accept such weak means-ends relationships between the hypothetical purposes and the statutory classifications,[36] that it has been able to uphold virtu-

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[30] See Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 349-50 (1949).

[31] Linde, note 29, at 222-35; Loewy, A Different and More Viable Theory of Equal Protection, 57 N.C.L. Rev. 1, 49-53 (1978); Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 27-28.

[32] Lee, Politics, Ideology, and the Power of Public Choice, 74 Va. L. Rev. 191, 191 (1988).

[33] On public choice, see generally J. Buchanan & G. Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (1962) (the seminal work in the field); Farber & Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873 (1987); Mikva, Foreward to Symposium on the Theory of Public Choice, 74 Va. L. Rev. 167 (1988).

[34] Posner, note 31, at 28.

[35] See text accompanying notes 40-43.

[36] See text accompanying notes 44-46.

ally all challenged classifications without ever having squarely to address the question of whether simply responding to pressure is a legitimate legislative purpose.[37] Thus, it might well be argued that the Court has silently accepted the private interest view of politics, while continuing to pay lip service to the notion that legislation must be intended to serve some public-regarding purpose.

In the last half century, following the end of the *Lochner*[38] era of substantive due process, the Court has only once "invalidate[d] a wholly economic regulation on equal protection grounds," and it later overruled that aberrational decision.[39] The Court has achieved this nearly perfect record by showing extreme deference to challenged classifications in two ways, as mentioned above. First, the Court is willing to imagine — on its own,[40] or based on suggestions of counsel or a lower court—a legitimate purpose which a challenged classification might be designed to accomplish, and to analyze the rationality of the classification in light of this purpose.[41] The Court will do this even though there is no indication in the statute or the legislative history that the legislature had such a purpose in mind; in fact, it is willing to do this even if it is clear the legislature did *not* act with the supposed purpose.[42] The Court has gone so far as to state that if a plausible legitimate purpose exists, it is "constitutionally irrelevant" whether it was the actual purpose of the legislation.[43] Second, the Court is willing to go to great lengths in assuming the facts

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[37] Cohen, Federalism in Equality Clothing: A Comment on Metropolitan Life Insurance Company v. Ward, 38 Stan. L. Rev. 1, 26 nn.115-16 (1985). But see Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 33-34, 49-50 (1985) (citing cases where the Court came close to indicating that a mere response to political pressure is not a legitimate purpose).

[38] Lochner v. New York, 198 U.S. 45 (1905).

[39] City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976), overruling Morey v. Doud, 354 U.S. 457 (1957) (the aberrational case). The two cases are discussed in text accompanying notes 96-110.

[40] "In performing this [equal protection rationality] analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts." Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450, 463 (1988).

[41] See, e.g., *Kadrmas*, 487 U.S. at 465 (upholding a classification because of a "legitimate purpose" the legislature "could conceivably" have had in mind); Lyng v. Castillo, 477 U.S. 635, 642-43 (1986) (speculating about arguments that "might well have convinced Congress," and about what "Congress might have reasoned"); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where . . . there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' Flemming v. Nestor, 363 U.S. [603], at 612"); Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) (imagining legitimate purposes which "may" have motivated the legislature, "[f]or all this record shows"); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 552-63 (1947) (speculating about legitimate purposes which "might have prompted" the Louisiana legislature to permit nepotism in the selection of river pilots).

[42] Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205, 1225 & n.66 (1970) (citing Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); and *Kotch*, 330 U.S.552).

[43] *Fritz*, 449 U.S. at 179 (quoting 363 U.S. at 612).

necessary to establish a rational relationship between the supposed legislative purpose and the classification at issue. The Court has explained that "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[44] For example, in *Railway Express Agency, Inc. v. New York*,[45] the Court upheld a New York City ordinance which prohibited the operation within the city of vehicles displaying advertising signs, except that owners of vehicles could advertise their own products. The Court accepted the promotion of traffic safety as the purpose of the ordinance, and held that the distinction between owner-advertising and other advertising was rationally related to that purpose, because it was possible "that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use."[46]

The Court has repeatedly stated that the equal protection requirement is not violated simply because legislation attacks problems piecemeal, or "one step at a time."[47] If it is always a sufficient justification of a statutory classification that the legislature decided to proceed one step at a time, it is difficult to see how any classification could violate the rational basis standard. There must be some limitation on when the Court will accept this justification, but it is far from clear just what that limitation

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[44] Vance v. Bradley, 440 U.S. 93, 111 (1979). The Court has expressed its willingness to assume the facts necessary to make legislation rational in many other cases as well. See, e.g., *Kadrmas*, note 40, at 463 (quoting above sentence from *Vance*); Bowen v. Gilliard, 483 U.S. 587, 601 (1987); Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 672 (1981) ("the Equal Protection Clause is satisfied if we conclude that the California Legislature *rationally could have believed* that the retaliatory tax would promote its objective [emphasis in original]"); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981) (also quoting *Vance*); United States v. Maryland Sav.-Share Ins. Corp., 400 U.S. 4, 6 (1970) ("Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts."); Dandridge v. Williams, 397 U.S. 471, 485 (1970) (quoting the sentence below from *McGowan*); McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

[45] 336 U.S. 106 (1949).

[46] Id. at 110.

[47] "[T]he reform may take one step at a time, addressing itself to the phase of the problems which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955) (citations omitted); see also City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (quoting a portion of the above passage from *Williamson*, and noting that a "gradual approach to the problem is not constitutionally impermissible"); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (quoting a portion of the above passage from *Williamson*, and adding that "a legislature need not run the risk of losing an entire remedial scheme because it failed, through inadvertence or otherwise, to cover every evil that might conceivable have been attacked"); *Railway Express Agency, Inc.*, 336 U.S. at 110 ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.")

may be.[48] The existence of some limitation is hinted at by the Court's statement that reform may proceed one step at a time if it does so by attacking "the phase of the problem which seems most acute to the legislative mind."[49] This may imply that the legislature must have some rational basis for considering one phase of the problem more acute than the others.[50] Nevertheless, the Court's continued reliance on the one step at a time justification is another indication of the extremely deferential standard of review in rational basis equal protection challenges to economic regulation.

Why is the Court's equal protection review of economic regulation so deferential? One possibility is that the justices have actually accepted the private interest view of politics as normative,[51] but for some reason do not want to admit it.[52] Thus, their opinions continue to use the rhetoric of public interest, but their results are consistent with the private interest theory. A less extreme variation on this hypothesis would be that the Court, without fully accepting the private interest viewpoint as normative, recognizes that interest group politics plays an inevitable and legitimate role in the legislative process. Thus, the Court does not want to invalidate legislation for failure to promote a legitimate public purpose except in cases of the most outrageous triumphs of pressure groups over the public interest. In short, perhaps the Court does not enforce a strong version of the requirement that legislation be in the public interest, because the Court accepts that there is a legitimate role for pressure group politics, and so does not believe in a strong version of the public interest requirement.

The Court's deference may also be attributed to institutional concerns. Respect for the separation of powers (or federalism, in the case of state legislation) understandably makes the Court reluctant to overturn legislative decisions.[53] Moreover, the Court may be reluctant to conclude

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[48] "If the step-at-a-time justification is sometimes proper and independent of the other validating criteria, surely not every instance of noncongruence can be thus justified. What, then, determines when the justification can be successfully invoked?" P. Brest & S. Levinson, Processes of Constitutional Decisionmaking 560 (2d ed. 1983).

[49] *Williamson*, 348 U.S. at 489.

[50] Relevant here is the Court's statement in Plyler v. Doe, 457 U.S. 202, 227 (1982), that legislation which provides benefits to some but not others cannot be justified solely on the basis that limiting the benefits saves the government money: "[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."

[51] See text accompanying notes 31-34.

[52] This possibility is mentioned by Sunstein, note 37, at 66.

[53] Schweiker v. Wilson, 450 U.S. 221, 230 (1981) ("The equal protection obligation . . . is not an obligation to provide the best governance possible. This is a necessary result of different institutional competences, and its reasons are obvious. . . . [T]his Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems."); Ferguson v. Skrupa, 372 U.S. 726, 730 (1962) ("[C]ourts do not substitute their

that a statute is not rationally related to its purpose, because of a belief that the legislature's fact-finding ability is superior to that of the Court's.[54] Finally, the Court may believe it lacks the competence to make the determination of legislative purpose which is necessary for serious equal protection review. It may be difficult or impossible to determine the motivation of a multimember legislature,[55] and, in cases of doubt, the Court may be influenced by the "considerable awkwardness in attributing an impermissible motivation to a coordinate branch of government."[56] These institutional concerns may prevent the Court from striking down much legislation which is, in fact, solely the result of power struggles among private interests.[57]

The Supreme Court's equal protection review of tax legislation has been perhaps even more deferential than its review of economic legislation generally, if such a thing is possible.[58] Forty years ago, a classic article on equal protection stated that the Court's application of the equal protection clause to tax statutes "can only be described as an abandonment of it,"[59] and nothing has changed since then. For example, in a

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social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."); Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1714 (1984).

[54] Tussman & tenBroek, note 30, at 367-68 ("It is difficult to see that there is any intermediate point between complete deference to legislative fact-finding and independent judicial judgment about the facts."); Note, note 3, at 649 & n.30. For Supreme Court opinions adopting an extremely deferential approach to legislative fact-finding, see note 45.

[55] Sunstein, note 53, at 1713-14; Sunstein, note 37, at 77; Tussman & tenBroek, note 30, at 366-67; Note, note 3, at 650.

[56] Sunstein, note 53, at 1714.

[57] Some commentators have suggested that, because legislatures are not subject to the same institutional concerns as courts, individual legislators should oppose private interest legislation on equal protection grounds, even when they know that courts would reject an equal protection challenge to the legislation out of institutional concerns. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1220-28 (1978); Note, Tax Equity, note 3, at 649-50.

[58] For an extremely unusual example of a lower court holding a tax statute unconstitutional as a violation of the rational basis equal protection standard, see Rosenberg v. United States, 86-2 U.S.T.C. ¶ 13,703 (C.D. Cal. 1986) (holding it was a violation of equal protection for a retroactive denial of an estate tax exemption for public housing project notes to apply to taxpayers which had filed returns including such notes in their taxable gross estates, but not to apply to taxpayers which had not included such notes on their returns). The opinion seems inconsistent with the Supreme Court's rational basis equal protection analysis. See, e.g., Estate of Bradford v. United States, 645 F. Supp. 476 (N.D. Cal. 1986) (holding that the same classification at issue in *Rosenberg* did *not* violate equal protection). *Rosenberg* was reversed by the Supreme Court on statutory grounds, in United States v. Wells Fargo Bank, 485 U.S. 351 (1988).

[59] Tussman & tenBroek, note 30, at 368. To similar effect, see Sager, note 57, at 1216-17 ("[C]laims that classifications made in the fashioning of schemes of taxation . . . are arbitrary or unfair simply are not congenial to the federal courts"). Professors Bittker and Lokken have noted: "Even during the heyday of substantive due process in the economic area, when legislative decisions to regulate some businesses or persons but not others were subject to intense constitutional scrutiny, the courts never used the due process clause to police the federal in-

1982 decision, the Court remarked that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[60] The Court in that case rejected an equal protection challenge to a provision of the Internal Revenue Code which treated veterans' organizations more favorably than other tax exempt organizations. The Court offered the following quotation from its 1940 opinion in *Madden v. Kentucky* [61] in explanation of its special deference for tax legislation:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.[62]

A challenger could seldom, if ever, succeed in "negativ[ing] every conceivable basis which might support" a classification in a tax statute.[63] Professors Bittker and Lokken are probably correct in their observation that "the tax laws have drawn so many distinctions that even a Supreme Court confident of its power to distinguish between reasonable and arbitrary behavior in other statutory areas has hesitated to act as a referee of

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come tax." 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 1.2.5 (2d ed. 1989).

[60] Regan v. Taxation With Representation, 461 U.S. 540, 547 (1983). The Court quoted this sentence with approval in Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983) (upholding Alabama severance tax against rational basis equal protection challenge). For another relatively recent case rejecting a rational basis equal protection challenge to a federal income tax statute, see United States v. Maryland Sav.-Share Ins. Corp., 400 U.S. 1, 4 (1970).

[61] 309 U.S. 83 (1940).

[62] Id. at 87-88 (footnotes omitted), quoted in 461 U.S. at 547-48.

[63] For a rare case sustaining an equal protection challenge to a federal income tax provision, see Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972), cert. denied, 412 U.S. 906 (1973). However, the challenged classification was based on sex—a quasi-suspect classification triggering heightened scrutiny—and, therefore, the case is not authority for invalidating tax legislation under the rational basis standard.

tax legislation."[64]

Whatever the reasons for the extreme judicial deference to economic regulation in general, and to tax legislation in particular, the result would seem to be an almost automatic rejection of any equal protection challenge to ad hoc tax legislation.[65] Consider a case in which a taxpayer who did not lobby for or receive favorable ad hoc tax legislation challenges the granting of such legislation to another taxpayer who lobbied successfully. The Court could easily sustain the classification simply by holding that the fact that one taxpayer petitioned Congress for a special rule, while the other did not, is itself a sufficient justification for treating the two differently. Congress cannot be expected to search out on its own those taxpayers whose peculiar circumstances give them strong eq-

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[64] B. Bittker & L. Lokken, note 59, ¶ 1.2.5. The Supreme Court's recent opinion in Allegheny Pittsburgh Coal Co. v. County Comm'n, 109 S. Ct. 633 (1989), arguably points in a different direction. Upon close examination, however, it does not appear to be of direct relevance to a challenge to ad hoc tax legislation, despite the fact that it upheld an equal protection challenge to a tax assessment. Webster County, West Virginia valued real property for property tax purposes according to the price at which the property last sold. Since only minor adjustments were made in the appraisals of property not recently sold, the result was gross disparities between the valuations of recently transferred property and otherwise comparable property. The Court rejected the County's argument "that its assessment scheme is rationally related to its purpose of assessing properties at true current value" (id. at 637), in light of the fact that "petitioners' property has been assessed at roughly 8 to 35 times more than comparable neighboring property, and these discrepancies have continued for more than 10 years with little change." Id. at 634. This appears to be a rather stringent application of the rationality test.

The reason for the Court's strictness, however, seems to be that the challenged discrimination was not "the law of a State, generally applied," but only "the aberrational enforcement policy" of a single county. Id. at 638 n.4. The Court indicated that West Virginia law provided that property "shall be taxed at a rate uniform throughout the state according to its estimated market value" (id. at 638), and that there was no state law or practice which authorized Webster County's approach to valuation, with its gross undervaluations of non-recently purchased property. Id. It seems that, if the Webster County valuation method had been authorized by state law, the Court would have been more willing to hypothesize legitimate purposes, and probably also less exacting in its scrutiny of the means-end relationship. Id. at 638-39. The Court would probably show considerably greater deference to a legislature than to a loose cannon of a county assessor. In fact, the Court specifically noted that its holding as to the unconstitutionality of an assessment method based on sales prices was limited to the situation in which the method was not authorized by state law; it indicated that the result might be different if—as in the case of California's "Proposition 13"—state law mandated such a method. Id. at 638 n.4. If this reading of *Allegheny Pittsburgh Coal Co.* is correct—that the Court's willingness to find an equal protection violation depended on the fact that the discrimination was the result of an "aberrational enforcement policy"—then the case has no application to the explicit legislative determinations embodied in ad hoc tax provisions.

For an argument, however, that the implications of *Allegheny Pittsburgh Coal Co.* may extend beyond cases of aberrational enforcement, see Glennon, Taxation and Equal Protection, 58 Geo. Wash. L. Rev. 261 (1990). Professor Glennon is highly critical of the *Allegheny Pittsburgh Coal Co.* decision.

[65] However, Professor Doti concludes—rather remarkably, and with very little discussion—that "[a]lthough rational basis is the most lenient [equal protection test], it appears that the 'rifle-shot' transition rules do not pass the test." Doti, note 4, at 91. He demonstrates little appreciation of how very leniently the courts have applied the traditional rational basis test.

uitable arguments for special relief from general tax provisions; rather, such taxpayers must come to Congress. Thus, providing a special rule for one taxpayer, but not for the other, is rationally related to the legitimate purpose of providing relief for deserving taxpayers, to the extent that can be done without the need for Congress to initiate a hunt for those taxpayers.[66] This is essentially the justification which Senator Levin received from the Senate Finance Committee concerning the 1986 Act's rifle shot transition rules: "[W]e tried to provide equal treatment wherever possible for meritorious cases . . . *based on the submissions we received from Members of [Congress].*"[67] This is in keeping with the one step at a time cases[68] which allow Congress to "address itself to the phase of the problem which seems most acute to the legislative mind."[69] The problem of the taxpayer who petitions Congress for relief would naturally appear most acute to Congress. The Court has also stated: "A Legislature may hit at an abuse which it has found, even though it has failed to strike at another."[70] By the same token, a legislature should be able to provide special relief for those deserving taxpayers it has found, without providing relief for others it has not found.

The above analysis would be sufficient to dispose of most equal protection challenges to ad hoc tax legislation. But what about the case of a taxpayer who lobbied for, but did not receive, special relief, who challenges the granting of special relief to a similarly situated taxpayer? The problem for the challenger here would be that it is virtually impossible for the two taxpayers to be identically situated. For example, if the relief sought is a rifle shot transition rule, and the justification is detrimental reliance on the continuation of the old law, there will inevitably be some difference in the details of the reliance by, or the detriment to, different taxpayers. The Court can focus on that difference, whatever it is, and conclude that Congress reasonably could have decided that the difference gave the lucky taxpayer a stronger claim for relief than the unlucky taxpayer. Weighing the relative strengths of different claims for equitable relief is more a matter of taste than of logic,[71] and the equal protection

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[66] In some cases, a taxpayer's explanation of why it deserved favorable tax treatment might, in effect, identify other equally deserving taxpayers. For example, a university seeking special treatment for contributions to its athletic programs (see note 9) might make an argument obviously equally applicable to the athletic programs of all other universities. In such a case, the fact that one university requested relief and others did not should not justify a special favor for the one university, because the request served to alert Congress to the plight of *all* universities.

[67] 132 Cong. Rec. S13,810 (daily ed. Sept. 27, 1986) (emphasis added).

[68] See notes 47-49 and accompanying text.

[69] Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955).

[70] United States v. Carolene Prods. Co., 304 U.S. 144, 151 (1938) (citations omitted).

[71] Recall the applause meters used on the old "Queen for a Day" television show to determine which contestant had the most pathetic hard luck story. Senator Packwood, in defending the 1986 Act's rifle shot transition rules on the Senate floor, remarked: "There will be criti-

standard apparently permits legislatures to draw distinctions based on judgments of taste in those cases.[72] Such a judgment might be better described as nonrational than as either rational or irrational, but in any event it appears to be constitutionally permissible.[73]

The prospects for a successful equal protection challenge to an ad hoc tax provision may not be quite as dismal, however, as the above discussion suggests. Over the past two decades, the Court has struck down a number of statutes while purporting to apply a mere rational basis equal protection standard. In every case, the statute involved one or more elements which took it beyond the realm of "wholly economic regulation."[74] Several cases involved discrimination by states against new residents.[75] Other cases involved discrimination against out-of-state corporations,[76] the mentally retarded,[77] nontraditional households,[78] tenants appealing evictions from their homes,[79] and undocumented alien children seeking free public education.[80]

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cism, I know. Who is to say which project deserves a transition. Those are subjective judgments." 132 Cong. Rec. S13,786 (daily ed. Sept 27, 1986).

[72] See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (stating that the city council could reasonably decide that certain pushcart vendors should be permitted in the French Quarter because they "had themselves become part of the distinctive character and charm that distinguishes the Vieux Carre," but that other less charming vendors should be prohibited).

[73] On the role of "discretionary choice" in rational basis equal protection analysis, see P. Brest & S. Levinson, note 48, 561-63; Ely, note 42, at 1235-49.

[74] 427 U.S. at 306.

[75] Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (a New Mexico statute granted a property tax exemption to Vietnam veterans who had resided in New Mexico before May 8, 1976); Williams v. Vermont, 472 U.S. 14 (1985) (a credit against the Vermont automobile use tax, for sales tax paid on the purchase of an automobile in another state, was available only to a person who was a Vermont resident at the time he paid the sales tax); Zobel v. Williams, 457 U.S. 55 (1982) (an Alaska statute providing for distribution of oil revenues to adult state residents made the amount of the distributions proportional to the number of years a person had been a state resident).

[76] Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (5-4 decision). For an analysis of "*Ward*'s peculiar equal protection doctrine" as "part of an understandable, if debatable, course of decisions narrowing the early broad reading given the McCarran-Ferguson Act," and as not providing "a base for the resurgence of economic equal protection," see Cohen, note 37, at 27.

[77] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (city ordinance required special use permit for a group home for the retarded, but not for other care and multiple-dwelling facilities).

[78] United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (federal law denied food stamps to any household containing a member who was unrelated to any other household member).

[79] Lindsey v. Normet, 405 U.S. 56 (1972) (Oregon law permitted a tenant to appeal in an eviction case only if he posted a bond for twice the rental value of the property during the pendency of the appeal; an equivalent bond was not required for any other kind of appeal).

[80] Plyler v. Doe, 457 U.S. 202 (1982) (Texas law denied state funds to local school districts for the education of undocumented alien children, and authorized school districts not to admit such children).

In many of the cases, the Court rejected a proffered legislative purpose as illegitimate.[81] Perhaps the most sweeping such rejection was the Court's statement that "a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[82] Many of the cases also reflect a much more searching examination of the rationality of the relationship between purposes the Court accepts as legitimate and the statutory classifications, than is normal in rational basis equal protection analysis.[83] In these cases the Court abandons its normal stance of finding a classification to be rational "if any state of facts reasonably may be conceived to justify it."[84] In one case, for example, the Court indicated its unwillingness "to accept as rational the Government's wholly unsubstantiated [factual] assumptions."[85] Dissenting justices have convincingly demonstrated that classifications which the Court has found to be irrational would be permissible under ordinary rational basis equal protection analysis of economic legislation.[86]

None of the special circumstances which have led to more searching scrutiny under the guise of the rational basis standard are ordinarily present in the case of ad hoc tax provisions. The Court continues to apply only minimal scrutiny to purely economic legislation.[87] Neverthe-

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[81] Illegitimate purposes included accommodating the prejudices of property owners concerning the mentally retarded (City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985)); "favor[ing] established residents over new residents based on the view that the State may take care of 'its own' " (Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985)); encouraging the formation of domestic insurance companies by taxing them at a lower rate than other insurance companies (Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 876 (1985)); and rewarding long-time residents for past contributions to the state (Zobel v. Williams, 457 U.S. 55, 63 (1982)).

[82] United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (emphasis in original) (rejecting the idea that limitations on food stamp eligibility could be justified by the purpose of preventing "hippies" from receiving food stamps).

[83] See, e.g., *Cleburne Living Center*, 473 U.S. at 449-50; *Hooper*, 472 U.S. at 620-22; Williams v. Vermont, 472 U.S. 14, 23-27 (1985); *Plyler*, 457 U.S. at 227-30; *Moreno*, 413 U.S. at 535-38; *Lindsey*, 405 U.S. at 76-78.

[84] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[85] *Moreno*, 413 U.S. at 535.

[86] See, e.g., *Cleburne Living Center*, 473 U.S. at 456-60 (Marshall, J., concurring in part and dissenting in part) ("Yet Cleburne's ordinance surely would be valid under the traditional rational basis test applicable to economic and commercial regulation."); *Hooper*, 472 U.S. at 632 (Stevens, J., dissenting) ("Even if there are a few isolated cases in which the general classification produces an arbitrary result, that is surely not a sufficient reason for concluding that the entire statute is unconstitutional."); *Williams*, 472 U.S. at 33-35 (Blackmun, J., dissenting) ("A tax classification does not violate the demands of equal protection simply because it may not perfectly identify the class of people it wishes to single out"); *Plyler*, 457 U.S. at 248-53 (Burger, C.J., dissenting) ("Without laboring what will undoubtedly seem obvious to many, it simply is not 'irrational' for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present"); *Moreno*, 413 U.S. at 546-47 (Rehnquist, J., dissenting).

[87] See text accompanying notes 38-64; see also 2 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure 45 (Supp. 1988) ("There may be no

less, the cases are somewhat encouraging to a challenger of ad hoc tax legislation, in that they at least indicate that judicial invocation of the rational basis standard no longer means that the plaintiff automatically loses. As Justice Marshall noted (albeit in disapproval): "The suggestion that the traditional rational basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational basis review."[88]

A challenger might also be somewhat encouraged by the fact that there has developed in recent years a substantial amount of academic support for a more searching rational basis standard. Professor Cass Sunstein's work in this area has been especially important.[89] Sunstein argues that the Constitution embodies a philosophy of politics and legislation he calls "Madisonian republicanism."[90] This philosophy recognizes that a large part of the legislative process necessarily consists of a struggle among private interests or pressure groups, but it also holds that legislators must take the common good into account in their deliberations.[91] Under this view of the Constitution, the equal protection rationality requirement "may . . . be understood precisely as a requirement that regulatory measures be something other than a response to political pressure."[92]

Sunstein contends that the requirement that legislation have a legitimate public purpose—rather than being simply the unprincipled out-

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trend toward active review of economic and social welfare legislation. The Supreme Court, in majority opinions, continues to assert that it will only review economic and social welfare legislation . . . under the rational relationship standard [citation omitted].").

[88] *Cleburne Living Center*, 473 U.S. at 459-60 (Marshall, J., concurring in part and dissenting in part); see also L. Tribe, American Constitutional Law § 16-3, at 1445 (2d ed. 1988) ("With no articulated principle guiding the use of this more searching [rational basis] inquiry, even routine economic regulations may from time to time succumb to a form of review reminiscent of the *Lochner* era.").

[89] E.g., Sunstein, note 37; Sunstein, note 53; Sunstein, note 29.

[90] Sunstein, note 37, at 47.

[91] Id. at 38-48.

[92] Id. at 49 (footnote omitted). A similar view of the equal protection rationality requirement was expressed Tussman and tenBroek in their classic article:

> It would appear that the requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups—a theory which puts forward some conception of a "general good" as the "legitimate public purpose" at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of the legislative process.
>
> . . . . We would suggest . . . that the pledge of the protection of equal laws is intelligible only within the framework of the second of these alternatives [a public interest theory of legislation], and that the pressure theory of legislation and the equal protection requirement are incompatible. Accordingly, if this is true, we must conclude that legislative submission to political pressure does not constitute a fair reason for failure to extend the operation of a law to those similarly situated whom it leaves untouched.

Tussman & tenBroek, note 30, at 350.

come of a raw power struggle—is sufficiently important that it justifies a strengthening of rationality review. More stringent review would be intended "to ensure that disparate treatment is justified by reference to something other than an exercise of political power by those benefited—or, to state the matter more positively, to ensure that representatives have exercised some form of judgment instead of responding mechanically to interest-group pressures."[93] The level of scrutiny would be heightened in two ways: Courts would consider only actual, not hypothetical, legitimate legislative purposes, and courts would require a closer relationship—more than "a merely plausible connection"—between the statutory classification and legitimate purposes.[94] In short, Sunstein's analysis would support the application of something like the heightened rational basis scrutiny the Court has applied in special situations, to the ordinary run of economic legislation.[95] The concerns about institutional capacity which seem to have made the rational basis standard meaning-

[93] Sunstein, note 37, at 69.

[94] Id.

[95] Other articles advocating a significant role for rational basis equal protection analysis include Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Calif. L. Rev. 1049 (1979); Bice, Rationality Analysis in Constitutional Law, 65 Minn. L. Rev. 1 (1980); Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849 (1980); Michelman, Politics and Values or What's Really Wrong with Rationality Review?, 13 Creighton L. Rev. 487 (1979).

In addition, Justice Jackson offered what has become a well-known argument for taking the rational basis equal protection test seriously:

> Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if large numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

Although it is undeniably a powerful passage, it is not altogether compelling as an argument for more serious scrutiny of ad hoc tax legislation. First, taking the passage on its own terms, it is largely in praise of the use of equal protection to prevent oppression of minorities. It does not address the situation of ad hoc tax provisions, in which the minority is favored and the majority oppressed. Second, and more fundamentally, the passage arguably understates the effect of invocation of the equal protection clause on the legislature's ability to legislate. Drawing distinctions and making classifications is of the essence of legislation; telling the legislature it cannot draw particular lines thus strikes close to the heart of the legislative power.

less as applied to economic legislation are legitimate concerns,[96] but arguably, they are not sufficient to justify the judiciary's near total abdication of its role in ensuring that legislation serve some public purpose.

How, then, might a challenge to an ad hoc tax provision be aided by the occasional Supreme Court case applying some form of heightened rational basis scrutiny, and by the theoretical arguments supporting a broader application of more searching scrutiny? The Court might be persuaded to view with suspicion any tax law which selects one taxpayer (or a very few taxpayers) for special treatment, with the suspicion based on the common sense notion that such special treatment is inherently likely to be the result of special interest lobbying, rather than of principled deliberation. The very existence of such legislation suggests that the legislative process has been subverted to serve purely private ends, and that suggestion justifies applying a less deferential form of rationality review. In other words, extreme narrowness of legislation arguably should be one of the special circumstances triggering heightened rationality review.

However reasonable this approach may sound, it faces a serious obstacle in the overruling of *Morey v. Doud*[97] by *City of New Orleans v. Dukes*.[98] The Court in *Dukes* described *Morey* as "the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds."[99] *Morey* was a 1957 case involving an Illinois statute which regulated the issuance of money orders. The statute exempted American Express money orders, by name, from all of its provisions.[100] The state argued that the discrimination between American Express and all other sellers of money orders was rationally related to the purpose of protecting the public in dealing with sellers of money orders: "Because the American Express Company is a world-wide enterprise of unquestionable solvency and high financial standing, the State argues that the legislative classification is reasonable."[101] The Court disagreed. Although it noted that statutory classifications by name are not per se unconstitutional,[102] it also stated that " 'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the [equal protection clause].' "[103]

The Court found the American Express exemption had only a "remote

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[96] See text accompanying notes 53-57.

[97] 354 U.S. 457 (1957), overruled by City of New Orleans v. Dukes, 427 U.S. 297 (1976).

[98] 427 U.S. 297 (1976), overruling Morey v. Doud, 354 U.S. 457 (1957).

[99] Id. at 306.

[100] *Morey*, 354 U.S. at 461-62.

[101] Id. at 464.

[102] Id. at 464-65 (citing Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911)).

[103] Id. at 465 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37-38 (1928)).

relationship"[104] to the purpose of protecting the public, for several reasons. American Express might lose the characteristics that made it unusually trustworthy, other sellers of money orders might acquire the same characteristics, and the local stores selling the American Express money orders might be themselves unreliable.[105] These imperfections in the relationship of the classification to the legislative purpose were deemed fatal to the statute's constitutionality, in light of the Court's expressed hostility to "the creation of a closed class by the singling out of the money orders of a named company, with accompanying economic advantages."[106]

Nineteen years later, in *Dukes*, the Court went out of its way to overrule *Morey*. *Dukes* rejected a challenge to a New Orleans ordinance which prohibited pushcart food vendors in the French Quarter, except for vendors who had been in business there for more than eight years.[107] Only two vendors qualified under the ordinance's grandfather clause. The Court could easily have upheld the New Orleans ordinance without overruling *Morey*. The grandfather clause in *Dukes* was legitimated by the purpose of protecting "substantial reliance interests"[108] in the established vendors; no such purpose was implicated in *Morey*. The Court might also have distinguished the cases on the basis that the *Dukes* ordinance, although it happened to treat two vendors specially, did not single them out by name; instead it identified them by a characteristic (years of operation in the French Quarter) relevant to a legitimate purpose (protection of reliance).[109] Nevertheless, the Court claimed that *Morey* was "essentially indistinguishable" from *Dukes*,[110] and stated that the *Morey* "decision so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled."[111]

The problem presented to a challenger of an ad hoc tax provision by the overruling of *Morey* is apparent. In *Morey*, the Court adopted the suggested attitude of suspicion to laws which single out one person for special treatment. The overruling of *Morey* thus would seem to indicate that the Court now rejects the notion that such laws should be viewed with any particular suspicion. That is a plausible reading of *Dukes* and, if it is correct, there is almost no chance that the Court will invalidate any ad hoc tax legislation.

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[104] Id. at 469.

[105] Id. at 466-67.

[106] Id. at 469. Justices Black, Frankfurter, and Harlan, in dissent, believed the American Express exemption was rational. Id. at 472-75 (Black, Frankfurter, & Harlan, J.J., dissenting).

[107] City of New Orleans v. Dukes, 427 U.S. 297, 298, 304 (1976).

[108] Id. at 305.

[109] The Court also suggested that long-established vendors might have "themselves become part of the distinctive character and charm" of the French Quarter. Id.

[110] Id. at 306.

[111] Id.

There is, however, a plausible narrower reading of *Dukes* as well. On a narrower reading, the result in *Morey* would be wrong, even granting the propriety of more searching scrutiny of special rules for particular persons. The suggestion, after all, is only that such special rules should receive rigorous rationality review, not that those rules automatically should be invalidated. *Dukes* might simply mean that American Express clearly possessed unique characteristics, so that a special exemption for American Express should have been held to be rationally related to the legitimate purpose of protecting the public, even under rigorous rationality review. If *Dukes* is understood in this way, it does not foreclose the possibility of heightened scrutiny for ad hoc tax provisions.

If the Court did decide to apply a rigorous form of rationality review to special tax provisions, what might that review look like? This heightened review would have two elements: one focused on ends, and one on means.[112]

First, the Court would refuse to hypothesize (or accept the hypotheses of counsel or of lower courts) concerning legitimate public purposes for ad hoc rules. Instead, the Court would consider only those purposes indicated in the legislative history or in the statute itself.[113] The legitimate purpose might be found in the statute itself if the taxpayer eligible for special treatment is described, rather than named, *and* the described characteristics themselves suggest a legitimate reason for special treatment. For example, a taxpayer receiving a rifle shot transition rule might be described in terms of the details of the taxpayer's reliance on old law. On the other hand, the singling out of a taxpayer by description rather than by name would not aid in the defense of the law if the described characteristics are of no relevance to any principled justification for the special rule, as in the case of the special benefit for a university's athletic programs, with the university described in terms of when it was estab-

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[112] Sunstein, note 37, at 69.

[113] There are assertions in the legislative history of the 1986 Act that, although politics necessarily played a role in the determination of who received transition rules, Congress also tried to be fair. Senator Packwood said he "would not be surprised if . . . on occasion political considerations crept into the body politic . . . . All we can try to do is make an honest decision . . . ." 132 Cong. Rec. S13,904 (daily ed. Sept. 27, 1986). At another point he stated, "It would be foolish of me to say that, on occasion, politics did not enter those judgments . . . . But, Mr. President, as honestly as we could, we tried to be fair in the transitions and we tried to make sure that they did not violate the basic tenets of the bill." 132 Cong. Rec. S13,786 (daily ed. Sept. 27, 1986). Similarly, Senator Levin quoted a response he received from the Senate Finance Committee, which said: "[W]e tried to provide equal treatment wherever possible for meritorious cases, within our budget constraints, based on the submissions we received from Members of the Senate and House of Representatives." 99th Cong., 2d Sess., 132 Cong. Rec. S13,810 (daily ed. Sept. 27, 1986). Statements such as these would have very little weight under the proposed standard of review. On the one hand, the mere admission that raw politics played some role in the legislative process would not be sufficient to invalidate the legislation. On the other hand, a mere blanket statement that Congress tried to be fair would not establish that the legislation was rationally related to a legitimate purpose.

lished.[114] If no legitimate purpose appeared in the legislative history or on the face of the statute, the Court would conclude that the special provision must have been the result of private interest politics, and would invalidate the provision.

Such a requirement might have little practical effect in the long run. Once Congress became aware of the requirement, it would simply make sure that the statute or the legislative history asserted a legitimate purpose for every ad hoc provision. Even this might have some value. If Congress were forced to offer a justification to the public for every special rule, it might deliberate more carefully before enacting those rules. It might enact only those rules for which it could construct plausible justifications. Moreover, the required justifications would give the special provisions greater visibility, and only those provisions which could survive the glare would be enacted.

The second element of heightened scrutiny would have the Court require something more than a barely plausible connection between the asserted legitimate purpose and the statutory classification. The justification for this is that suspicion is so great that ad hoc tax provisions are unprincipled concessions to powerful lobbyists, that it should take a *substantial* relationship between the classification and the legitimate purpose to negate that suspicion. A highly tenuous means-end relationship suggests that the asserted purpose is just a cover for a deal based on pure power politics.

Suppose the asserted purpose of a rifle shot transition rule is to protect a taxpayer's reliance interests, and that the legislative history indicates the extent of the taxpayer's reliance. Under the suggested approach, that would not necessarily be the end of the matter. Instead, the Court might observe that the mere fact the taxpayer relied on old law cannot be sufficient to justify a special rule, given that many other taxpayers who received no special provision must also have relied on old law.[115] The Court, then, would adopt a "things are tough all over" attitude. That is, it would assume a normal range of reliance on old law by the entire group of taxpayers affected by the change, and it would uphold the special provision as rational only if the extent of the favored taxpayer's reasonable detrimental reliance was extraordinary—only if it went well beyond the normal range of reliance not protected by a special transition rule. One important consequence of this approach—comparing the favored taxpayer with an assumed normal range of taxpayers—is that a

[114] See the 1986 Act, note 1, § 1608(b)(1). This provision is discussed in note 9.

[115] This point was made during the Senate debate on the 1986 Act, by Senators who objected to rifle shot transition rules. For example, Senator Levin remarked, "The problem is that for every one of the 650 for whom there is a special rule, there could be thousands of similarly situated [taxpayers] for whom there is only the cold glare of retroactivity." 132 Cong. Rec. S13,810 (daily ed. Sept 27, 1986).

special provision would not be upheld as rational simply because a lucky taxpayer asked for such a provision while other taxpayers did not.[116]

As another example of the application of the approach, consider the 1986 Act's special provision for the benefit of contributors to one particular college athletic program which has plans for the renovation of its stadium.[117] The most deferential form of rationality review might uphold this provision, on the basis that a program with stadium renovation plans has special financial needs. But a more searching "things are tough all over" approach might take notice that many college football programs are renovating or enlarging stadiums or building new ones, or at least would like to do so; thus, the favored program's situation is not so special as to justify special relief.

The more rigorous rational basis test described above has considerable appeal for anyone who believes that the equal protection guarantee is supposed to prevent legislation enacted at the behest of powerful private interests, without regard to the common good.

There is, however, an important price to pay for the invalidation of some ad hoc tax provisions. In some cases, an ad hoc provision may be the only politically feasible alternative to a special interest provision of much broader application. Suppose, for example, that the political power of the supporters of the University of Texas and Louisiana State University athletic programs is so great that an exception to the normal charitable deduction rules for contributions to those programs is inevitable. The only question then is whether the favorable treatment should be limited to those two programs or should be extended to the athletic programs of all universities.[118] On a more cosmic level, it may be that passage of the Tax Reform Act of 1986, with all of its laudable tax policy improvements, would have been impossible without the use of ad hoc tax

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[116] See text accompanying notes 65-70. In the unusual case in which the plaintiff had itself unsuccessfully requested a rifle shot transition rule, the Court might compare the recipient of the special provision with the plaintiff in particular, as well as with the universe of affected taxpayers. A more rigorous particularized comparison would not automatically accept the existence of *any* distinction between the reliance of the two taxpayers as justifying a statutory classification based on Congressional "taste" (see text accompanying notes 71-73); instead, the Court would require that the reliance of the favored taxpayer be substantially greater in some way.

[117] The 1986 Act, note 1, § 1608(b)(2). This provision is discussed in note 9.

[118] This particular issue is real. The Technical and Miscellaneous Revenue Act of 1988 eliminated the 1986 Act's special benefit for Texas and Louisiana State, but replaced it with an exception to the normal charitable deduction rules applicable to the athletic programs of all universities. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6001, 102 Stat. 3342, 3683-84, codified at IRC § 170(m). (The 1988 Act's provision allows a deduction for 80% of the amount which would not be deductible under normal rules; the 1986 Act allowed deduction of 100% of such amounts, but only for amounts paid to Texas and Louisiana State Universities.)

provisions to secure the support of key legislators.[119]

A more rigorous application of the rational basis test in these cases might result in worse tax policy. If equal protection means Congress cannot grant an unjustified benefit to two college athletic programs unless it grants the same benefit to all programs, then, as a matter of political reality, equal protection may mean Congress must grant an unjustified benefit to all college athletic programs. If equal protection means Congress cannot grant a few rifle shot transition rules as it generally reforms the tax laws, then, as a matter of political reality, equal protection may mean Congress cannot reform the tax laws at all.[120]

It is not unreasonable to take the position that the equal protection guarantee is simply more important than good tax policy and that, therefore, the rational basis test should be applied rigorously regardless of the effect on tax policy.[121] On the other hand, concern about hampering a legislature's ability to achieve whatever degree of reform is politically possible may make the Court unwilling to apply the test with any great rigor. The Court's frequently expressed willingness to permit reform legislation to proceed piecemeal or one step at a time can be understood as reflecting this concern.

One can even make an argument that, in this context, equal protection interests are best served by not invalidating ad hoc tax legislation. The assumption in this discussion has been that the general provision in question—the provisions changed by the 1986 Act, or a rule favoring all college athletic programs—is bad tax policy. If so, that may mean that the general provision itself represents a triumph of special interest pressure

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[119] For suggestions that the ad hoc provisions may have been necessary to the passage of the act, see text accompanying notes 14-16. Consider also the comments of Senator Howard Metzenbaum during the Senate debate on the Act. He remarked to Senator Packwood, that "if you [Packwood] had the votes, you probably would have knocked more of [the rifle shot transition rules] out than are presently on the agenda." In reply, Senator Packwood stated he "would not be surprised if . . . on occasion political considerations crept into the body politic." 132 Cong. Rec. S13,904 (daily ed. Sept. 27, 1986). At another point, Senator Metzenbaum stated: "If we tell the American people what we are doing and why we are doing it, even if we say that we put that particular provision in because we needed to get a majority of members of the Senate Finance Committee to go along with this conference report or there would be no bill, I think the American people would understand that." 132 Cong. Rec. S13,874 (daily ed. Sept. 27, 1986). Senator Danforth claimed that many Senators did not like the tax reform bill, but would vote for it because they had received the transition rules they had requested. 132 Cong. Rec. S13,796 (daily ed. Sept. 27, 1986).

[120] One commentator reasonably concluded, "On balance it is likely that broad undeserved tax provisions are more detrimental to a sound system of taxation than artificially narrow ones." Note, Tax Equity, note 3, at 660. Professors Brest and Levinson have stated the general question as follows: "Should a legislature be precluded from enacting a desirable reform measure if it can only gain the necessary votes by exempting a group that cannot rationally be distinquished from those covered?" P. Brest & S. Levinson, note 48, at 560 n.5. They do not attempt to answer their own question.

[121] This appears to be the answer Tussman and tenBroek would give. See Tussman & tenBroek, note 30, at 349-51.

groups (such as corporations investing heavily in property eligible for the investment tax credit, or college athletic programs) over the public interest. Nevertheless, it is inconceivable that the Court, in the post-*Lochner* era would adopt a rational basis test rigorous enough to invalidate so general a provision.[122]

Thus, one can consider the undesirable general tax provision to be as serious a violation of equal protection as the ad hoc tax provisions, or even more serious, because its scope is greater. Under this view, then, nothing is gained by striking down the ad hoc tax provision as an equal protection violation; the result would be a general provision that is just as offensive to equal protection, but is immune from attack.

There is, of course, a counter-argument: Ad hoc provisions are much more likely than general provisions to be the result of raw power politics, so that it is appropriate to scrutinize carefully, and sometimes to invalidate, ad hoc provisions, without concern about what general provisions may result from the invalidation. Under this view, general provisions simply do not raise equal protection concerns of the same magnitude as those raised by ad hoc provisions.

There is no particularly tidy conclusion to be drawn concerning the fate of an equal protection challenge to an ad hoc tax provision. Most of the rational basis equal protection precedents suggests that such a challenge would be dismissed rather summarily. On the other hand, if the Court desired to subject ad hoc tax provisions to more serious scrutiny, there is precedent in other areas for a heightened rational basis analysis, and there are good arguments why extremely narrow classifications deserve careful scrutiny. It is doubtful whether this would be enough to overcome extremely deferential precedent, the institutional concerns that counsel deference, and the desire not to hamper Congress' ability to make reforms one step at a time. On balance, it appears quite unlikely that any equal protection challenge would succeed.[123] If, however, the

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[122] Such general provisions are so clearly related to what the Court would consider clearly legitimate purposes (for example, encouraging college athletics), that the Court will certainly uphold them. Even if the Court suspects tht the legitimate purpose is not the real purpose, it would be unwilling to ascribe an illegitimate purpose to Congress when the legitimate one is so plausible. The Court would certainly view ascribing an illegitimate purpose in such a case as showing disrespect for, and unduly interfering with, a concomitant branch of government. See text accompanying notes 53-57 (regarding institutional competence and separation of powers).

[123] The district court in Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285, 1296-98 (N.D. Tex. 1988), indicated that the proper equal protection test to be applied was the traditional rational basis standard. The court went on to explain:

> However, this Court is unable to determine whether there is a rational basis for the classification based upon the evidence presented. The Court directs the parties to present additional evidence to the Court, either in the form of affidavits or live testimony to determine whether these classifications are rationally related to the purpose of protecting taxpayers who would be unduly burdened by the new tax laws.

Id. at 1298.

Court found a particular ad hoc provision so viscerally offensive that it wanted to strike down the provision, the precedents and the arguments do exist to enable it to do so.

B. The Tax Uniformity Clause

Article I, section 8, clause 1 of the Constitution requires that "all Duties, Imposts and Excises shall be uniform throughout the United States." Although it is clear that this uniformity requirement applies to the income tax,[124] it is far from clear whether a uniformity clause challenge to a special tax provision could ever succeed.

The Supreme Court's most recent examination of the tax uniformity clause was the 1983 case *United States v. Ptasynski*,[125] which involved a challenge to the constitutionality of the windfall profit tax. The Crude Oil Windfall Profit Tax Act of 1980[126] exempted from that tax oil produced in certain parts of Alaska. Producers of oil in other parts of the country brought suit challenging the Act as violating the tax uniformity clause because of the Alaska exemption. The district court ruled that "[d]istinctions based on geography are simply not allowed" by the uniformity clause.[127] The court found that the unconstitutional Alaska exemption could not be severed from the remainder of the Act, and so it struck down the entire windfall profit tax.

The Supreme Court reversed. It began its analysis by reviewing the purpose of the tax uniformity clause. It declared that the general purpose of the clause was to prevent Congress from using its taxing power "to the disadvantage of particular States."[128] The Court quoted an extrajudicial statement of Justice Story, which seemed to indicate that the clause was primarily aimed at preventing "the grossest and most oppressive inequalities."[129]

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[124] Brushaber v. Union Pac. R.R., 240 U.S. 1, 14-16 (1916).

[125] 462 U.S. 74 (1983).

[126] 26 U.S.C. §§ 4986-4998 (1982 & Supp. V 1987), repealed by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1941(a), 102 Stat. 1107, 1322.

[127] Ptasynski v. United States, 550 F. Supp. 549, 553 (D. Wyo.), rev'd, 462 U.S. 74 (1983).

[128] *Ptasynski*, 462 U.S. at 81.

[129] "[The purpose of the Clause] was to cut off all undue preferences of one State over another in the regulation of subjects affecting their common interests. Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist. The agriculture, commerce, or manufactures of one State might be built up on the ruins of those of another; and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors." Id. (quoting 1 J. Story, Commentaries on the Constitution of the United States § 957 (T. Cooley ed. 1873)).

One commentator has argued that the Court's failure to quote Story in context suggests "that the uniformity clause was meant to prevent only the most egregiously discriminatory

The Court next examined its earlier opinions interpreting the uniformity clause. It paid particular attention to the *Head Money Cases* of 1884,[130] in which the Court had rejected a uniformity clause challenge to a head tax imposed on immigrants who entered the country through port cities, but not on immigrants who entered at inland cities. The fact that the tax did not "fall[ ] equally or proportionately on each State"[131] was held not to be sufficient reason to invalidate the tax under the uniformity clause. The Court held that, since the tax applied equally to all ports, "there [was] substantial uniformity within the meaning and purpose of the constitution."[132] It was sufficient to satisfy the uniformity clause that the tax "operate[d] with the same force and effect in every place where the subject of it is found,"[133] despite the fact that the subject of the tax was not distributed equally among the states. The *Ptasynski* opinion noted that cases decided after the *Head Money Cases* "confirmed that the Framers did not intend to restrict Congress' ability to define the class of objects to be taxed. They intended only that the tax apply wherever the classification is found."[134]

Given the rule of the *Head Money Cases*—that the uniformity clause is satisfied as long as a tax "operates with the same force and effect in every place where the subject of it is found"[135]—the crucial question becomes what limits (if any) the clause places on permissible subjects of taxation. If there were no limits on permissible subjects, then the *Head Money* rule would make the clause utterly meaningless. A subject of tax could be expressed in the most blatantly geographic terms—for example, Texas oil (or California oranges, or Virginia tobacco) — and the clause would not apply, because the tax would "operate[ ] with the same force and effect in every place where [Texas oil] is found."[136]

Ptasynski provided a two-part answer to the question of permissible subjects of taxation. First, the Court concluded that there are no limitations on permissible subjects, as long as the subjects are expressed in nongeographic terms, even if the result is a highly geographically discriminatory tax: "Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied."[137] In support of this conclusion, the Court cited *Knowlton v. Moore*,[138] a 1900 case in which

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taxation, while Story's point is almost the opposite." Comment, The Uniformity Clause, 51 U. Chi. L. Rev. 1193, 1201 n.44 (1984).

130 Edye v. Robertson, 112 U.S. 580 (1884) [hereinafter the *Head Money Cases*].

131 *Ptasynski*, 462 U.S. at 82.

132 *Head Money Cases*, 112 U.S. at 595 (quoted in *Ptasynski*, 462 U.S. at 82).

133 Id. at 594 (quoted in *Ptasynski*, 462 U.S. at 82).

134 *Ptasynski*, 462 U.S. at 82.

135 *Head Money Cases*, 112 U.S. at 594.

136 Id. This point is made in Comment, note 129, at 1195-97.

137 *Ptasynski*, 462 U.S. at 84.

138 178 U.S. 41 (1900).

the Court upheld, against a uniformity clause challenge, an inheritance tax the rates of which varied according to a progressive rate schedule and according to classes of legatees. The Court rejected the argument that the uniformity clause permitted only a flat rate inheritance tax. In the course of its opinion, the Court discussed at length the history of the uniformity clause, and concluded: "By the result, then, of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity."[139] The *Ptasynski* opinion took this passage from *Knowlton v. Moore* to mean that the requisite geographic uniformity exists as long as the subject of the tax is not expressed in geographic terms.[140]

This conclusion was insufficient to decide *Ptasynski*, however, because the Alaska oil exemption *was* defined in geographic terms. The Court explained that even a subject of taxation defined in geographic terms *may* be permissible. In such a case, the Court must "examine the classification closely to see if there is actual geographic discrimination."[141] The geographically defined subject is permissible if there is no "actual geographic discrimination"; it is not permissible if there is "actual geographic discrimination." By "actual geographic discrimination," the Court apparently had in mind a situation in which the geographic distinctions were intended simply to benefit one state or region at the expense of others (or to harm one state or region to the benefit of others), rather than to address "geographically isolated problems."[142] The Court held that there was sufficient justification for the Alaska exemption to satisfy the uniformity clause. The Court cited "ample evidence of the disproportionate costs and difficulties—the fragile ecology, the harsh environment, and the remote location—associated with extracting oil from this region."[143] The Court also noted that "[n]othing in the Act's legislative history suggests that Congress intended to grant Alaska an undue preference at the expense of other oil-producing States."[144]

Many of the special provisions of the 1986 Act include geographic descriptions,[145] and so would be subject to review for actual geographic discrimination under *Ptasynski*. The crucial question would be whether the challenged ad hoc provision was a reasoned response to the isolated

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[139] *Knowlton*, 178 U.S. at 106.

[140] *Ptasynski*, 462 U.S. at 84. For an argument that the *Ptasynski* Court's reading of *Knowlton v. Moore* is "simply wrong," see Comment, note 128, at 1203 n.46.

[141] *Ptasynski*, 462 U.S. at 85.

[142] Id. at 84.

[143] Id. at 85.

[144] Id. at 86.

[145] For a large number of transition rules expressed in geographic terms, see the 1986 Act § 251(d)(3), (4) (relating to depreciation rules and the rehabilitation tax credit).

problem of a particular taxpayer, or an unprincipled exercise of raw political power. This is essentially the same question raised by rational basis equal protection analysis.[146] Since most ad hoc tax provisions can be plausibly explained either as reasoned responses or as raw power politics, the standard of review is of paramount importance. In sharp contrast to the equal protection area, there is very little judicial guidance as to the level of scrutiny to be applied in testing for actual geographic discrimination under the tax uniformity clause. The *Ptasynski* opinion sends mixed signals. On the one hand, the Court states that "where Congress does choose to frame a tax in geographic terms, we will examine the classification *closely* to see if there is actual geographic discrimination.[147] On the other hand, the Court's actual analysis of the purpose of the Alaska exemption appears quite superficial and deferential.[148] Moreover, the Court freely admits it is "reluctant to disturb [Congress's] determination."[149] Perhaps all that can be said is that *Ptasynski* suggests a level of scrutiny somewhat higher than that of traditional rational basis analysis, but still quite deferential.[150]

In any event, the significance of *Ptasynski* for the constitutionality of special tax provisions lies not so much in its rather vague analysis of when the uniformity clause will invalidate explicit geographical classifications, as in its statement that the clause will never invalidate a distinction expressed in nongeographic terms.[151] The statement is technically

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[146] See text accompanying notes 25-123.

[147] *Ptasynski*, 462 U.S. at 85 (emphasis added).

[148] Id. at 85-86.

[149] Id. at 86.

[150] Two lower court opinions have considered tax uniformity clause challenges in light of *Ptasynski*. In Augusta Towing Co., Inc. v. United States, 5 Cl. Ct. 160 (1984), the plaintiffs challenged the constitutionality of a federal fuel tax which applied to fuel used by vessels engaged in commerce on certain named waterways. The court stated that its analysis of whether there was actual geographic discrimination "followed the guidance of the Second Circuit regarding [reasonable basis] scrutiny of a tax statute challenged under the Equal Protection clause." Id. at 169. In concluding that there was no actual geographic discrimination, the court stated that "the factors that Congress considered . . . had a rational relationship to the purpose of the Act." Id. at 171-72.

The other case was the challenge to the transition rules of the 1986 Act in *Apache Bend*. The court stated that "the transition rules do not violate the Uniformity Clause because there is no evidence that the transition rules benefit or hinder the citizens of any state or region of the country." *Apache Bend*, 702 F. Supp. at 1296. The court offered no factual support for this sweeping statement. Such a summary dismissal seems inappropriate with respect to those transition rules expressed in geographic terms, in light of the statement in *Ptasynski* that taxes framed in geographic terms must be closely examined for actual geographic discrimination. *Ptasynski*, 462 U.S. at 85.

[151] Professor Doti apparently believes that the *Ptasynski* test for actual geographic discrimination should be applied to all rifle-shot transition rules, regardless of whether they contain geographic terms. He justifies this on the basis that, "Although most of the rules are not defined in geographic terms, they operate in substance on a geographic basis." Doti, note 4, at 86. Doti's assertion is simply wrong, given the clear statement in *Ptasynski* that the test does not apply if the subject of the tax is defined in nongeographic terms. *Ptasynski*, 462 U.S. at 84.

dictum, since the distinction in *Ptasynski* was explicitly geographic, but it is carefully considered dictum, which the Court is not likely to abandon.[152]

It is always possible for Congress to describe the beneficiary of a special tax provision without the use of geographic terms. A simple designation by name would suffice (at least as long as the name itself did not include geographic terms), or more subtle nongeographic descriptions could also be used.[153] If any ad hoc tax provision containing geographic terms were struck down under the uniformity clause, Congress would quickly learn its lesson and write all subsequent special provisions in nongeographic terms. In the long run, then, the *Ptasynski* dictum that the uniformity clause does not apply to distinctions expressed in nongeographic terms would seem to make a dead letter of the uniformity clause as it relates to special tax provisions (and more generally as well).[154]

The *Ptasynski* opinion—and particularly its dictum that the clause does not apply to distinctions not expressed in geographical terms—has been strongly criticized by a Comment in the *University of Chicago Law Review* for leaving the uniformity clause "virtually an empty shell."[155] The Comment argues, based on its analysis of the purpose of the uniformity clause, for a different interpretation of the clause. The Comment

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Doti views the actual geographic discrimination test as equivalent to the equal protection rational basis test. Doti, note 4, at 86. He concludes that "many of these transition rules violate the uniformity clause due to their failure to satisfy any notion of rational basis." Id. at 91. He does not appear to understand the extreme leniency of the traditional rational basis standard.

[152] "This dictum is a crucial element of the Court's understanding of the meaning of the uniformity clause. For that reason, although it is not strictly necessary to the holding in the case, it contributes significantly to the analysis that appears to lead the Court to its holding; the dictum is therefore obiter only in a somewhat attenuated sense." Comment, note 129, at 1200 n.30.

[153] An especially popular technique is to describe the beneficiary in a way which suggests the beneficiary had acted in reliance on the continuation of old law. There are numerous examples scattered throughout the 1986 Act. See, e.g., Tax Reform Act of 1986, note 1, § 204(a)(5), 100 Stat. at 2149-55, which contains a number of rifle shot transition rules relating to depreciation, with the beneficiaries described in terms suggesting their reliance. For example, § 204(a)(5)(S) describes a situation in which:

> (i) convertible subordinated debentures were issued in August 1985, to finance the project,
>
> (ii) construction of the project was authorized by the Board of Directors of the taxpayer on or before December 31, 1985,
>
> (iii) at least $750,000 was paid or incurred with respect to the project on or before December 31, 1985, and
>
> (iv) the project is placed in service on or before December 31, 1986.

In many other cases, however, the description of the beneficiary does little or nothing to indicate the justification for the provision. See notes 6-9 and accompanying text.

[154] "*Ptasynski* teaches Congress how good draftsmanship can protect its tax laws against uniformity clause challenges; but in doing so, it deprives the clause of any force as a check on congressional power." Comment, note 129, at 1194.

[155] Id. at 1193.

contends that the purpose of the clause is "to inhibit the use of the taxing power to give any region a competitive advantage over other regions that it would not enjoy in the absence of the tax."[156] Under this interpretation a tax should be invalidated if it has geographically discriminatory effects, even if its terms are not expressly geographically discriminatory, unless it "serve[s] some significant purpose other than promoting [geographic] discrimination."[157] The formal statement of the proposed test is: "if the definition of the subject of a tax is tailored to serve some significant purpose other than to promote the competitive advantage of goods or services produced in one region over those of another region, the tax should be upheld despite any incidental geographically discriminatory effects that may result from the definition."[158] Under this proposal, the only distinction between taxes framed in nongeographic terms and those framed in geographic terms is that the former would enjoy a presumption of validity (that is, of the existence of a legitimate, nondiscriminatory purpose), while the latter would not.[159]

The Supreme Court is likely, however, to adhere to its dictum in *Ptasynski*, in part because of the significant practical advantage of the dictum. Virtually any tax has somewhat discriminatory geographic effects, simply because the subject of the tax is more common in one region than another. A tax on tobacco, even though totally lacking in express geographic discrimination, will burden one region much more than others; the same is true of a tax on liquor, or of a tax on almost anything.[160] Thus, the likely result of a rule that the uniformity clause could be violated by a tax not expressed in geographic terms, if its discriminatory effects were sufficiently severe or unjustified, would be the emergence of uniformity clause challenges to a great many taxes. The Court's per se rule — no violation if no geographic terms are used—avoids opening this Pandora's box.[161] Moreover, the Comment admits that there is some historical support for the Court's decision to limit the application of the uniformity clause to egregious cases of express geographic discrimination.[162]

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156 Id. at 1217.

157 Id. at 1209.

158 Id. at 1218-19.

159 Id. at 1222-23.

160 See the Court's rhetorical questions in the *Head Money Case:* "Is the tax on tobacco void, because in many of the States no tobacco is raised or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it?" 112 U.S. at 594.

161 For a somewhat grudging acknowledgement of this point, see Comment, note 129, at 1222.

162 Id. at 1207-208. In analyzing the historical support, the Comment states as follows:

> By focusing on the spectacle of horrors evoked by Justice Story, the Court is apparently led to assume that the uniformity clause is *only* meant to prevent geographic discrimination so gross and oppressive that it would actually endanger the Union .... The Court's

In any event, a critical analysis of the propriety of the *Ptasynski* dictum is somewhat beside the point for purposes of this article. The question is how the Supreme Court would analyze a uniformity clause challenge to a special tax provision, and there is little reason to think the Court would reexamine the underpinnings of the *Ptasynski* dictum if confronted with such a challenge. One would expect the Court simply to invoke the dictum and uphold the provision (assuming the provision was free of geographic terms).

Some doubt is thrown on that conclusion, however, by the Supreme Court's interpretation of the bankruptcy uniformity clause in *Railway Labor Executives' Association v. Gibbons*.[163] The case arose under the bankruptcy uniformity clause of the Constitution, which gives Congress the power to "establish . . . uniform laws on the subject of Bankruptcies throughout the United States."[164]

In response to the bankruptcy of the Rock Island Railroad, Congress had enacted the Rock Island Railroad Transition and Employee Assistance Act (RITA).[165] RITA included labor protection provisions which required the Rock Island trustee to provide as much as $75 million in benefits to Rock Island employees who did not find jobs with other carriers.[166] The reorganization court held this constituted a taking of the property of the creditors and bondholders of Rock Island, to serve the public purpose of protecting displaced employees. Since the taking was uncompensated, it violated the just compensation clause of the fifth amendment.[167] The Seventh Circuit affirmed by an equally divided vote.[168]

The Supreme Court did not reach the fifth amendment issue. Instead, it affirmed on the basis that RITA violated the bankruptcy uniformity clause—a rather surprising result, given that the Court had never before discovered a violation of the bankruptcy uniformity clause.[169] The Court held that "the uniformity requirement . . . prohibits Congress from enacting bankruptcy laws that specifically apply to the affairs of only one

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narrow reading of the clause is not totally without historical support. It is true that the confederation period was marked by very troublesome regional conflicts and that the framers probably were *most* apprehensive about exactly the sort of extreme factionalism that Story described.

Id. (footnotes omitted). However, the Comment ultimately rejects the Court's narrow reading of the purpose of the clause.

163 455 U.S. 457 (1982).

164 U.S. Const. art. I, § 8, cl. 4.

165 45 U.S.C. § 1001 et seq. (1976 ed., Supp. IV).

166 *Gibbons*, 455 U.S. at 461-62.

167 Id. at 463-64.

168 In re Chicago, R.I. & Pac. R.R. Co., 645 F.2d 74 (7th Cir. 1980) (en banc), aff'd, Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457 (1982).

169 *Gibbons*, 455 U.S. at 469.

named debtor."[170] The Court acknowledged that Congress could, without violating the bankruptcy uniformity clause, enact laws designed to deal with the special problems of railroad bankruptcies, or to address geographically isolated problems.[171] The Court cited the *Regional Railroad Reorganization Act Cases,*[172] in which the Court had rejected a bankruptcy uniformity clause challenge to legislation applying to reorganization proceedings involving several northeastern railroads. The Court distinguished the statute in the *3R Act Cases* from RITA, on the grounds that "[b]y its terms, RITA applies to only one regional bankrupt railroad."[173] The 3R Act, by comparison, covered the reorganizations of "8 major railroads and 15 lessors of leased lines of the Penn Central."[174] Another distinction was that the 3R Act in fact "operated uniformly upon all railroads then in bankruptcy proceedings,"[175] because, as it happened, no other railroads were in bankruptcy at that time. By contrast, there were railroads other than Rock Island in reorganization at the time RITA was enacted, as to which RITA did not apply.[176]

The Court claimed that its holding was dictated by the constitutional language:

> [T]he language of the Bankruptcy Clause itself compels us to hold that such a bankruptcy law is not within the power of Congress to enact. A law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor.[177]

The *Gibbons* ruling raises the question of whether the Court would extend the *Gibbons* rationale to the tax uniformity clause, to strike down special tax provisions for the benefit of a single taxpayer. Such an extension is a serious possibility, because the Court has been influenced by its interpretations of the bankruptcy uniformity clause, when interpreting the tax uniformity clause. In *Ptasynski*, the Court explained that "although the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uniformity Clause, we have looked to the interpretation of one clause in determining the meaning of the other."[178]

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[170] Id. at 471.
[171] Id. at 469.
[172] 419 U.S. 102, 159 (1974) [hereinafter *3R Act Cases*].
[173] *Gibbons*, 455 U.S. at 470.
[174] Id. at 470 n.10.
[175] Id. at 470.
[176] Id.
[177] Id. at 471 (citation omitted).
[178] *Ptasynski*, 462 U.S. at 83 n.13 (citing *3R Act Cases*, 419 U.S. at 160-61).

The problem is apparent. The *Ptasynski* opinion indicates that the tax uniformity clause would certainly not invalidate a special tax provision as long as it was not expressed in geographic terms (and would probably not invalidate a special tax provision even if it was expressed in geographic terms). *Gibbons*, however, indicates that a bankruptcy law concerned with the affairs of a single debtor offends the bankruptcy uniformity clause, and *Ptasynski* indicates that interpretations of the bankruptcy uniformity clause carry great weight in construing the tax uniformity clause. The result is a conflict of authority concerning the constitutionality of nongeographic special tax provisions: *Ptasynski* indicates they are constitutional; *Gibbons* suggests they are not. How would the Supreme Court resolve the conflict?

The Court did not have to address this problem in *Ptasynski*, because the windfall profit tax exemption for Alaska oil was not limited to a single taxpayer. After stating in the text of its opinion that the tax uniformity clause does not prohibit Congress from fashioning legislation to address geographically isolated problems, the Court disposed of *Gibbons* in a single footnote:

> [*Gibbons*] is not to the contrary. There we held that a statute designed to aid one bankrupt railroad violated the uniformity provision of the Bankruptcy Clause. We stated: "The conclusion is . . . inevitable that [the statute] is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad." [*Gibbons*,] at 470 (emphasis in original). It is clear that in this case [*Ptasynski*] Congress sought to deal with a geographically isolated problem.[179]

This manner of distinguishing *Gibbons* leaves open the possibility that the Court would find *Gibbons* persuasive in a case challenging a tax provision designed as a response to the problems of one taxpayer.

A narrow reading of *Gibbons*, combined with clever drafting by Congress, might enable the Court to sidestep the apparent conflict between *Gibbons* and *Ptasynski*. Twice in *Gibbons* the Court described its holding as being that the bankruptcy uniformity clause is violated by a statute applying to only "one named debtor."[180] This raises the possibility that *Gibbons* might not apply if the single debtor or taxpayer were described (in terms that would include no one else), rather than named. As Justice Marshall noted in his concurrence, "[t]he Court implies that a law which

[179] Id. at 85 n.14.

[180] *Gibbons*, 455 U.S. at 471, 473.

is general in its terms but in operation applies only to a single debtor might satisfy the uniformity requirement."[181] If so, a special tax provision might avoid all difficulties under the uniformity clause by describing rather than naming (*Gibbons*) its beneficiary in nongeographic terms (*Ptasynski*).

Such a narrow reading of *Gibbons* seems excessively formalistic. If special bankruptcy legislation dealing with the affairs of a single debtor is a serious enough evil to be constitutionally prohibited, the prohibition ought to be effective whether the single debtor is named or described. Moreover, there is nothing in the *Gibbons* opinion that compels so narrow a reading. The holding was narrow because a narrow holding was sufficient to decide the particular case, but the opinion's logic would extend to a case in which the single debtor was described rather than named. On the other hand, a rule that the bankruptcy uniformity clause does not apply as long as the single debtor is not named would be no more formalistic than the rule that the tax uniformity clause does not apply as long as the distinctions are not expressed in geographic terms. The formalism of the *Ptasynski* dictum thus lends some support for a narrow, formalistic reading of *Gibbons*.[182]

As far as the constitutionality of special tax provisions is concerned, the importance of questions as to how narrowly or broadly *Gibbons* should be interpreted is lessened by the likelihood that the Court would not extend the *Gibbons* analysis to the tax uniformity clause. There are several reasons to believe that the Court would probably not apply *Gibbons* in tax cases.

First, the *Gibbons* Court relied heavily on the history of the bankruptcy uniformity clause in reaching its conclusion, and there is no comparable history for the tax uniformity clause. The discussion in *Gibbons* of the history of the bankruptcy clause, as it relates to legislation for the relief of individual debtors, is confusing. However, the key points seem to be that at the time of the Constitutional Convention, several states "followed the practice of passing private Acts to relieve individual debtors,"[183] and that "the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest."[184] From this, the Court concluded that "the Bankruptcy Clause's uniformity require-

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[181] Id. at 475 n.1 (Marshall, J., concurring).

[182] There is another question concerning the scope of *Gibbons*: Whether it applies only to laws limited to a single debtor, or whether it would also apply to laws limited to a very few debtors. Logic suggests that if a law limited to a single debtor is not uniform, a law limited to a very few debtors may also not be uniform. On the other hand, the language of the *Gibbons* opinion and the result in the *3R Act Cases* (upholding a statute applying to only eight railroads and 15 lessors) suggest that the bankruptcy uniformity clause may invalidate only legislation limited to a single debtor.

[183] *Gibbons*, 455 U.S. at 472.

[184] Id.

ment was drafted in order to prohibit Congress from enacting private bankruptcy laws."[185] Other commentators have questioned the Court's reading of the historical record. There is considerable evidence that the real purpose of the uniformity requirement was to ensure that federal bankruptcy laws would be applicable in all states. Prior to the Constitutional Convention, states commonly disregarded discharges in bankruptcy granted by other states.[186] According to several commentators, the uniformity clause was most likely intended to prevent this result.[187] Under this interpretation, bankruptcy legislation applying to a single debtor would be uniform in the constitutional sense, so long as the legislation was effective across all jurisdictions within the United States.[188]

For present purposes, however, it matters little whether the Court was correct in its reading of the history of the uniformity clause. The impor-

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[185] Id. The crucial paragraph from the *Gibbons* opinion reads as follows:

> Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve individual debtors. Nadelmann, *On the Origin of the Bankruptcy Clause*, 1 Am. J. Legal Hist. 215, 221-223 (1957). Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. *See Millar v. Hall*, 1 Dall. 229 (Pa. Sup. Ct. 1788); *James v. Allen*, 1 Dall. 188 (Pa. Ct. Common Pleas 1786). Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States. *See* Nadelmann, *supra*, at 224-227. Similarly, the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws. *See* H. Black, *Constitutional Prohibitions* 6 (1887) (States had discriminated against British creditors). The States' practice of enacting private bills had rendered uniformity impossible.

Id. (footnote omitted).

A rather more coherent explanation than the Court's, of the historical support for reading the bankruptcy uniformity clause as a prohibition of private bankruptcy acts, is contained in Baird, Bankruptcy Procedure and State-Created Rights: The Lessons of Gibbons and Marathon, 1982 Sup. Ct. Rev. 25, 31. Baird notes that "the Framers considered giving Congress the power to enact bankruptcy laws immediately after a discussion of private acts of insolvency." From this, he speculates that "[p]ossibly [Charles] Pinckney [who proposed giving Congress the power to enact uniform bankruptcy laws] feared that Congress would abuse its power if it could pass special legislation that, like some state insolvency acts, applied only to the affairs of an individual debtor." Baird cites 1 Crosskey, Politics and the Constitution in the History of the United States 491-92 (1953), as drawing this inference. Baird concludes, however, by favoring a different historical explanation of the purpose of the uniformity requirement. 1982 Sup. Ct. Rev. at 31-34; see text accompanying note 187 (discussing intent of uniformity clause).

[186] Nadelmann, On the Origin of the Bankruptcy Clause, 1 Am. J. Legal Hist. 215, 225-26 (1957); The Supreme Court, 1981 Term, 96 Harv. L. Rev. 62, 74 (1982).

[187] Baird, note 185, at 31-34; Nadelmann, note 186, at 225-26; 1981 Term, note 186, at 73-74.

[188] This reading is also suggested by Justice Marshall in his concurrence, when he remarks that "the references to private Acts contained in the debates may have been intended only as examples of the . . . problem [of conflicting state insolvency laws], in that other States failed to give credit to such Acts." *Gibbons*, 455 U.S. at 474.

tant point is that the Court concluded (with at least some justification) that the bankruptcy uniformity clause grew out of the framers' dislike of private bankruptcy legislation. This author is aware of no similar history for the tax uniformity clause.[189] There are no indications that the tax uniformity clause was inspired by concern over special tax provisions for the benefit of one or a few taxpayers. (Rather, the tax uniformity clause was inspired by concern over taxes which discriminated among states or regions of the country.[190]) Thus, to the considerable extent that *Gibbons* is founded on the Court's reading of the history of the bankruptcy uniformity clause, there is no justification for extending its reasoning to the tax uniformity clause.

A second reason why the Court would probably not readily extend *Gibbons* to the tax clause is the impossibility of a uniform interpretation of constitutional uniformity provisions, as they relate to private legislation. There is a third constitutional uniformity provision, the naturalization uniformity clause,[191] which gives Congress the power "[t]o establish a uniform Rule of Naturalization." Although the question has never been considered by the Supreme Court, it is generally understood that the naturalization uniformity requirement does not prohibit Congress from passing a private bill to naturalize a particular person;[192] in fact, Congress has passed such bills.[193] Discussions in the *Federalist Papers* make clear that the naturalization uniformity requirement was intended to ensure simply that a person must be made a citizen of all states, or of none.[194]

Given the Supreme Court's conclusion in *Gibbons* that the bankruptcy uniformity clause prohibits private bankruptcy legislation, and the inescapable conclusion that the naturalization uniformity clause does not prohibit private immigration bills, it is impossible to interpret the tax uniformity clause consistently with each of the other uniformity provisions. If faced with this impossibility, the Court would probably retreat from its rather casual habit of "look[ing] to the interpretation of one [uniformity] Clause in determining the meaning of the other,"[195] and would, instead, emphasize its observation that "the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uni-

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[189] For a rather thorough review of the early history of the tax uniformity clause, see Knowlton v. Moore, 178 U.S. 41, 83-106 (1900).

[190] See text accompanying notes 128-29.

[191] Like the bankruptcy uniformity clause, the naturalization uniformity clause appears in art. I, § 8, cl. 4 of the Constitution.

[192] Baird, note 185, at 33.

[193] For examples of such bills, see Baird, note 185, at 33 n.24.

[194] Federalist Papers, No. 32 at 195; No. 42 at 276-77 (discussed in Baird, note 185, at 33).

[195] United States v. Ptasynski, 462 U.S. 7, 83 n.13 (1983).

formity Clause."[196] Freed of the influence of *Gibbons*, the Court would presumably proceed to reject a uniformity clause challenge to special tax provisions (not written in explicitly geographic terms), on the authority of the *Ptasynski* dictum.

There is one more reason why the Court would probably reject an attempt to extend the *Gibbons* analysis to a challenge to special tax provisions. *Gibbons* has been persuasively analyzed as an example of a hard case making bad law.[197] The result in *Gibbons* was dictated neither by the history of the bankruptcy uniformity clause,[198] nor by precedent.[199] There is also no apparent policy explanation as to why bankruptcy legislation should be subject to a strict uniformity requirement so unlike the extremely lenient rational basis equal protection requirement that applies to other economic legislation.[200]

What, then, explains the result in *Gibbons*? Recall that the lower court opinion had invalidated RITA under the takings clause. If the Court had not decided the case under the uniformity clause, it would have been forced to decide extremely difficult and important issues under the takings clause. A decision invalidating RITA under the takings clause would have had extremely broad repercussions; the validity of a great deal of legislation would have been called into question.[201] Reli-

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[196] Id. Faced with such a case, the Court would probably heed one commentator's criticism of its practice of looking to interpretations of one clause as a guide to construing the other:

> The Court itself acknowledged that the purposes of the two clauses are not identical. Since the Court did not explain what the different purposes are or why they do not affect the meaning of the words used, one is left without a compelling reason to suppose that the language has an identical meaning in both places.

Comment, note 129, at 1204 n.54 (citation omitted). Incidentally, if the Supreme Court did reject the notion of construing the clauses consistently, that would not call into serious question the Court's dictum in *Ptasynski* that the tax uniformity clause does not apply to distinctions expressed in nongeographical terms. It is true that the Court in *Ptasynski* did engage in the dubious practice of using a bankruptcy uniformity clause opinion (the *3R Act Cases*) as an important precedent, but it did so only on the question of how the Court should approach a discrimination explicitly couched in geographic terms. 462 U.S. at 83-84.

[197] 1981 Term, note 186, at 71-76.

[198] See text accompanying notes 186-88.

[199] The Court had never before invalidated legislation under the bankruptcy uniformity clause. *Gibbons*, 455 U.S. at 469. Moreover, the *3R Act Cases*, the most important precedent, could easily have been used as support for a decision rejecting the uniformity clause challenge in *Gibbons*. The *3R Act Cases* indicated Congress could properly enact legislation limited to bankrupts of a given class (419 U.S. at 158-61), and the Court could reasonably have concluded that the special circumstances of the Rock Island bankruptcy made Rock Island a " 'legitimate class of one.' " 455 U.S. at 474 (Marshall, J., concurring); see 1981 Term, note 186, at 74-75.

[200] 1981 Term, note 186, at 75.

[201] Understanding the Court's apparent activism in [*Gibbons*] depends on recognizing that the Court's result averted a decision on takings clause grounds, a decision that might have placed serious constraints on a broad range of future congressional action. Had the Court reached the takings issue, it would first have had to decide whether RITA in fact constituted a taking. Because the takings clause mandates a limit on congressional action far

ance on the bankruptcy uniformity clause enabled the Court to invalidate a law it apparently found viscerally objectionable, without having to disturb constitutional takings jurisprudence in the process. Although the result was to disturb bankruptcy uniformity clause jurisprudence instead, the effect of such a disturbance would be minor by comparison.[202]

If this understanding of *Gibbons* is correct—that it is an attempt by the Court to reach a dubious, but desired result in a particular case, with the least possible effect on other cases—then the Court would hardly be eager to extend *Gibbons* to tax cases. To the contrary, the Court would be looking for reasons not to extend *Gibbons*. As this discussion has demonstrated, such reasons are easy to find.

If, then, the Supreme Court were faced with the apparent conflict between *Ptasynski* and *Gibbons* as they relate to tax uniformity clause challenges to special tax provisions, the strong likelihood is that the Court would follow the *Ptasynski* dictum and reject a uniformity clause challenge to any special tax provision expressed in nongeographic terms.[203]

IV. The Choice of Remedy

If a court were to hold an ad hoc tax provision unconstitutional—as a violation of equal protection, the tax uniformity clause, or both—it would then have to determine the appropriate remedy for the violation. The several possibilities are discussed below.

A. Extension or Elimination of Favorable Treatment

If an ad hoc tax provision violates the Constitution, the unlawful discrimination can be remedied either by eliminating the ad hoc provision or by extending the benefit of the ad hoc provision to all similarly situated taxpayers.[204] As discussed below, there is considerable precedent concerning the appropriate remedy for an equal protection violation. By

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beyond the confines of the bankruptcy clause, a decision that RITA constituted a taking could have seriously constrained congressional action under the commerce clause and other constitutional grants of lawmaking power. Moreover, the Court was evidently troubled by the possibility that RITA involved a taking for a private, rather than a public, purpose and was unconstitutional on that ground. But for the Court to revitalize the public/private distinction with respect to the takings clause would also have placed serious limits on economic legislation.

Id. at 75-76 (footnote omitted).

[202] This is especially so if *Gibbons* is read narrowly to apply only when the debtor is named, or only when there is just one member of the debtor class. See text accompanying notes 180-82; 1981 Term, note 186, at 76.

[203] Professor Doti asserts that the *Gibbons* analysis applies to the tax uniformity clause as well as to the bankruptcy uniformity clause. Doti, note 4, at 87-89. He offers no analysis to support his claim.

[204] Heckler v. Mathews, 465 U.S. 728, 738 (1984).

contrast, there is virtually no precedent, and none from the Supreme Court, concerning the appropriate remedy for a violation of the tax uniformity clause.[205] There is no apparent reason, however, why the choice of remedy should differ depending on whether the remedy is for a violation of equal protection or of the tax uniformity clause. Thus, the equal protection precedents discussed below should be equally applicable to the uniformity clause.

The Supreme Court has remarked that the choice between remedying an equal protection violation by extension or elimination of favorable treatment is "within the 'constitutional competence of a federal district court.' "[206] The Court has stated that, in choosing the appropriate remedy, a court should " 'measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.' "[207] The application of this standard to ad hoc tax provisions clearly seems to suggest that elimination of the ad hoc provision is the appropriate remedy.[208] The ad hoc tax provision is an exception to a

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[205] The absence of Supreme Court precedent follows from the fact that the Supreme Court has never invalidated a statute under the tax uniformity clause. Comment, note 129, at 1193. (It is worth noting, however, that in the *Gibbons* bankruptcy uniformity clause case, the Court decided to invalidate, rather than to extend, the statute which unconstitutionally applied only to a single named debtor. 455 U.S. at 459-65. The Court apparently considered invalidation to be so clearly the proper approach, that it did not even discuss the issue of appropriate remedy.) The district court in *Ptasynski* did, however, reach the question of the appropriate remedy for what it believed to be a violation of the tax uniformity clause. Purporting to apply general principles of separability analysis, the court held that the proper remedy for the unconstitutional Alaska exemption was invalidation of the entire Windfall Profit Act (thus extending the benefit of the exemption to all oil producers). Ptasynski v. United States, 550 F. Supp. 549, 553-55 (D. Wyo. 1982).

[206] *Mathews*, 465 U.S. at 738-39 n.5 (quoting Califano v. Westcott, 443 U.S. 76, 91 (1979)).

[207] Id. (quoting Welsh v. United States, 398 U.S. 333, 365) (Harlan, J., concurring in result)).

[208] There is, however, a suggestion in the recent case of Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500 (1989), that elimination of favorable tax treatment might be beyond the remedial powers of a federal court. After determining that the Michigan income tax "violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees," the Court remanded the case to the Michigan court for a determination of the appropriate remedy. Id. at 1508-509. In the course of explaining why it did not determine the appropriate remedy itself, the Court noted that elimination of favorable treatment "could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." Id. In this connection, the Court quoted its comment in Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 752 (1961), that "[f]ederal courts may not assess or levy taxes." (*Moses Lake* involved a Washington state tax which violated intergovernmental tax immunity by imposing a higher tax on lessees of federal property than on other lessees. The Court held, surprisingly enough, that reducing the tax on federal lessees to a nondiscriminatory level was not an acceptable remedy, because such a *reduction* in tax would constitute an impermissible *imposition* of tax by a federal court. Id.)

What the Court actually did in *Davis*—remand to state court for a determination of the appropriate remedy for an unconstitutional discrimination contained in a state law—is unremarkable. The Court's comments, however, may have implications beyond that unremark-

general rule. The ad hoc provision applies to one or a handful of taxpayers; the general rule may apply to hundreds, thousands, or even millions. Under these circumstances, it seems safe to assume that Congress is more intensely committed to unfavorable treatment for the many than to favorable treatment for the few. Moreover, the "degree of potential disruption of the statutory scheme" would be far less if the benefit were eliminated than if it were extended.[209] Consider, for example, the severe disruption, primarily in the form of revenue loss, but also in the form of taxpayer and IRS confusion, if a court ruled that other taxpayers were

able result. Taken literally, the Court's statement that elimination of favorable tax treatment may exceed the limits of the remedial powers of a federal court applies only to the imposition of state taxes, and so would be irrelevant to a challenge to a federal tax. Such a narrow, literal reading would make considerable sense; it would understand the Court's comment as based on federalism concerns (i.e., *Congress* also cannot directly impose state taxes). However, it is possible to see in *Davis* the broader implication that perhaps a federal court can never remedy an unconstitutional discrimination in any tax statute by eliminating the favorable treatment, because that could be construed as the imposition of a tax by a federal court, in violation of the *Moses Lake* prohibition.

If *Davis* contains such an implication, it seems ill-considered and wrong. The Court would likely reject any such implication, if it squarely considered the question. Of course, federal courts cannot impose taxes, just as they cannot enact legislation generally. But federal courts do have the power to determine the appropriate remedy for equal protection violations in federal statutes, and their doing so does not violate the prohibition on judicial legislation. See, e.g., Heckler v. Mathews, 465 U.S. 728, 739 n.5 (1984). By the same token, federal courts should be able to select a remedy for an equal protection violation in a federal tax statute—including, in appropriate cases, elimination of favorable treatment—without worrying that they are thereby violating the prohibition on a judicial imposition of tax. It would be odd indeed if the normal federal judicial ability to select the least disruptive remedy for an equal protection violation in a federal statute did not apply in tax cases, because of an unthinking application of the rule that federal courts may not impose taxes. Id.

The Supreme Court is expected to rule later this term in Missouri v. Jenkins, cert. granted 109 S. Ct. 1930 (1989) (case below 855 F.2d 1295 (8th Cir. 1988)), on the question of whether a federal district court has the power to order a local property tax increase to fund desegregation remedies. The Court's opinion in *Jenkins* may or may not have relevance to the question discussed in this note.

[209] The Court has stated that in "cases involving equal protection challenges to underinclusive federal benefits statutes," extension of favorable treatment is normally the proper remedy. *Westcott*, 443 U.S. at 89 (stating the principle and citing cases). However, *Westcott* and the cases it cites did not involve the question of extending special favorable treatment for a very few persons to all similarly situated persons. Thus, the extension remedy in those cases, unlike an extension remedy in a challenge to ad hoc tax provisions, did not involve the problem of the tail wagging the dog. Moreover, the Internal Revenue Code is certainly not what one normally thinks of as a "benefits statute," and considerations applicable to benefits statutes may not apply to the Code. Congress is in the giving vein when it enacts benefits programs such as Social Security and food stamps. It thus seems reasonable that if a distinction in a benefits program proves unconstitutional, Congress would normally prefer the more generous remedy. As the Court explained in *Westcott*, elimination of the benefit "would impose hardship on beneficiaries whom Congress plainly meant to protect." Id. at 90. (This consideration was particularly powerful in *Westcott*; the Court noted that an elimination remedy would mean denial of benefits to "300,000 needy children." Id.) By contrast, Congress is acting in the taking vein when it enacts tax legislation, and so there is much less reason to suppose Congress would prefer the more generous remedy. (The beneficiaries of special tax provisions also tend to be less emotionally appealing than large numbers of needy children.)

eligible for transitional relief from repeal of the investment tax credit, because of private transition rules for a few taxpayers.[210] Removing the exception will almost inevitably be less disruptive than making the exception the general rule.[211] This applies with special force to the 1986 Act, because the concept of revenue neutrality—that is, the idea that the Act should neither increase nor decrease tax revenues as compared with prior law—played so central a role in the passage of the Act.[212] Eliminating a favorable rule for one taxpayer will normally be more nearly revenue neutral than extending the rule to many other taxpayers. Thus, the special importance of revenue neutrality to the 1986 Act suggests elimination of an unconstitutional ad hoc provision would be the more appropriate remedy.[213]

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[210] The amount of disruption will depend largely on the breadth of the extension remedy. The narrower the extension, the less the disruption. However, fashioning a narrow extension remedy may be a most difficult task for a court. See text following note 213.

[211] The United States Court of Appeals for the District of Columbia, in Taxation With Representation of v. Regan, 676 F.2d 715 (D.C. Cir.), rev'd on other grounds, 461 U.S. 540 (1982), discussed whether an unconstitutional discrimination between veterans' groups and other tax exempt organizations should be remedied by extending favorable treatment to all exempt organizations or by denying favorable treatment to veterans' groups. Although the court remanded the case to the district court on the question of remedy, it noted that denial of benefits "appear[ed] the most logical and most in accordance with the judgments expressed by Congress" (id. at 743), in large part because the favorable treatment of veterans' organizations was the special exception to the general rule. Other exempt organizations outnumbered veteran's groups by more than 14 to one, and contributions to other exempt organizations exceeded contributions to veterans' groups by almost 1500 to one. Id. at 742.

[212] On the importance of revenue neutrality to the 1986 Act, see Staff of Joint Comm. on Taxation, 100th Cong., 1st Sess., General Explanation of the Tax Reform Act of 1986, at 11 (Comm. Print 1987) (noting that the increase in corporate income tax liability under the Act was matched by a corresponding decrease in personal income tax liability); J. Birnbaum & A. Murray, note 8, at 116-17, 260-61; Teuber, Revenue Estimators Play a New Role as Numbers Dictate Policy, 33 Tax Notes 698 (1986).

[213] In the recent case of Allegheny Pittsburgh Coal Co. v. Webster County, 109 S. Ct. 633, 639 (1989), the Court held that a plaintiff who was subjected to an equal protection violation in the valuation of property for property tax purposes, "may not be remitted by the State to the remedy of seeking to have the assessments of the undervalued property [of other taxpayers] raised." If the case is understood in context, however, it does not suggest that the proper remedy for an unconstitutional ad hoc tax provision is the extension of favorable treatment. The case involved discrimination not in the property tax statute itself, but in the administration of the statute, in that taxpayers other than the plaintiffs were not taxed as heavily as they should have been under the statute. (For a discussion of the case's equal protection analysis, see note 64.) The defendant taxing authority argued that, if there was an equal protection violation, the plaintiffs' remedy was to bring actions provided for by state law to have the assessments of other taxpayers raised. Id. at 637. In rejecting this argument, the Court quoted the following statement from Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946): "The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of taxes of other members of the class." (citing Iowa Des-Moines Nat'l Bank v. Bennett, 284 U.S. 239, 247 (1931); Cumberland Coal Co. v. Board of Revisions, 284 U.S. 23, 28-29 (1931); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445-47 (1923).) In *Hillsborough*, the Court had similarly rejected the argument that the bringing of actions

There would also be severe practical problems with an extension remedy. A court which determined that the differing treatments of the plaintiff and the favored taxpayer were unconstitutional might simply apply the extension remedy to the case before it. That is, the court might simply order the extension of the favorable treatment to the plaintiff, without attempting to delineate what other taxpayers are also entitled to extension of the benefit. That would lead, however, to a multiplicity of suits by other taxpayers seeking extension of the benefit, so eventually the limits of the extension remedy would have to be decided.

The problem is that those limits are not easily determined. Suppose one taxpayer were unconstitutionally granted a one-year exemption from repeal of the investment tax credit. The obvious extension remedy would seem to be a one-year transition rule for all taxpayers previously eligible for the credit. Upon reflection, however, the answer is less clear. In all likelihood Congress could have devised a one-year transition rule, broader than a rule for just one taxpayer and narrower than a rule for all taxpayers, which would have survived constitutional challenge. It would seem, then, that the proper extension remedy would be to grant a one year transition rule to the narrowest class which includes the favored taxpayer and does not violate the Constitution. But it may be far from obvious what that class would be, and a court would be ill-suited to perform the detailed quasi-legislative task of fashioning that class.

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under state law to increase the property tax assessments of others was the proper remedy for an alleged equal protection violation in the administration of the tax.

Thus, the crux of the Court's reasoning in *Allegheny Pittsburgh* and *Hillsborough* seems to be that the elimination of benefit remedy advocated by the taxing authorities is unduly burdensome on plaintiffs, in a procedural sense. It is not reasonable to require the plaintiff to bring numerous actions to raise the assessments on all taxpayers who were undertaxed relative to the plaintiff, in order to obtain relief from an equal protection violation. By contrast, the remedy of elimination of unconstitutional ad hoc tax provisions can be obtained by a plaintiff in a single suit; obtaining that remedy would be no more procedurally burdensome than obtaining an extension remedy. Thus, the concern which appears to be the basis for the *Allegheny Pittsburgh* and *Hillsborough* rule has no relevance to the choice of remedy for an unconstitutional ad hoc tax provision.

It is also worth noting that in none of these cases involving discrimination in the administration of property tax laws (*Allegheny Pittsburgh*, *Hillsborough*, and the cases cited in *Hillsborough*) was the remedy of extension of favorable treatment as disruptive as such a remedy would be in the case of a challenge to an ad hoc tax provision. (For a discussion of the principle that a court should generally choose the least disruptive remedy for an equal protection violation, see text accompanying notes 207-213.) In most of the cases (*Hillsborough*, *Iowa Des-Moines National Bank*, and *Sioux City Bridge*), the unfavorable treatment received by the plaintiffs appeared to be the exception to the general rule. In the other cases (*Allegheny Pittsburgh* and *Cumberland Coal*), the nature of the discrimination was such that it did not lend itself to labelling the treatment of the plaintiff as either the exception or the general rule. In no case, however, did the Court approve an extension remedy where to do so involved the disruption of making the exception the general rule. For this reason as well, the property tax administration cases do not support the adoption of an extension remedy for an unconstitutional ad hoc tax provision.

In fact, rifle shot transition rules are usually not general grants to particular taxpayers of the right to continue to use old law for a certain period of time. Rather, they are most often grants of the right to continue to apply old law with respect to a particular project, investment, or transaction. In such a case, a court fashioning an extension remedy would look for the narrowest constitutional classification of projects which would include the favored project. Again, that is not a task congenial to a court. (There is also the irony that the favored taxpayer itself might benefit from this relief, if the extension remedy included projects of the favored taxpayer other than the project covered by the rifle shot transition rule.)

The elimination remedy, by contrast, avoids all these difficulties. All that it requires is a determination that there is unconstitutional discrimination between the plaintiff and the favored taxpayer. It does not require a determination as to the amount of extension required to make transitional relief constitutional.[214]

Assuming elimination of the ad hoc provision is the appropriate remedy, the question arises as to whether the remedy should be applied ret-

[214] The Internal Revenue Code contains a separability clause, which provides: "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." IRC § 7852(a). The Supreme Court has not taken such separability clauses as inexorable commands, but it has interpreted them as creating a presumption in favor of the separability of the invalid provision from the rest of the statute. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987). With respect to an ad hoc provision contained in IRC § 7852(a) could provide additional support for the remedy of eliminating the special benefit by severing the unconstitutional ad hoc provision from the rest of the Code.

It can be argued, however, that a separability clause has no relevance to the choice of remedy for an equal protection (or uniformity clause) violation. The argument would be that the favorable treatment afforded a few taxpayers by an ad hoc provision is not unconstitutional per se; rather, it is only the coexistence of the special rule with a different general rule that is unconstitutional. Under this view, neither the special rule nor the general rule can be identified as *the* unconstitutional provision. If neither is the unconstitutional provision, then a separability clause cannot tell a court which provision to eliminate.

Although there is a certain cold logic to the argument, in the end it is unpersuasive. Despite the fact that logically it takes two different rules to create an unconstitutional discrimination, common usage would readily identify the narrow exception, and not the broad general rule, as the unconstitutional provision. Moreover, as a mechanical matter, elimination of the special benefit of an ad hoc rule ordinarily can be accomplished simply by severing the ad hoc provision, with the result that the general rule applies to all taxpayers. By contrast, extension of the special benefit would require not only striking out the general rule, but also rewriting the special rule to make it general (or striking out the special rule and rewriting the general rule to make it favorable to taxpayers). The separability clause should favor that which can be done by simple severance, over that which requires both severance and rewriting.

Two cases offer some support for this interpretation of the applicability of a separability clause to an equal protection challenge. In Moritz v. Commissioner, 469 F.2d 466 (10th Cir. 1972) cert. denied, 412 U.S. 906 (1973), the court held that the equal protection guarantee was violated by a provision of the Internal Revenue Code denying a particular deduction to men who had never married, but allowing the deduction to women, widowers, divorced men, and married men under certain circumstances. Relying in part on the Internal Revenue Code's

roactively, or prospectively only. Some ad hoc provisions provide permanent benefits[215]; a remedy limited to prospective invalidation of such a provision would be meaningful. In the case of many ad hoc transition rules, however, the special benefit applies only during a limited transition period. If that period has ended before a court decides the transition rule is unconstitutional, elimination of the ad hoc provision must be retroactive to be meaningful.

The Supreme Court has stated that "the Constitution neither prohibits nor requires [that] retrospective effect" be given to the Court's decisions.[216] The Court's method of analysis for determining whether to apply its decisions retroactively in civil cases was set forth in *Chevron Oil Co. v. Huson*.[217] The Court stated that it would consider three factors. First, for a decision to be applied nonretroactively, the decision must "establish a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was

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separability clause, the court ruled that the proper remedy was to strike down the exception (the unfavorable treatment of never-married men) and to retain the general rule.

The second case is Heckler v. Mathews, 465 U.S. 728 (1984), which involved an equal protection challenge to an exception to a general rule contained in Social Security legislation. The exception contained its own separability clause, which the Court noted "would prevent a court from redressing this inequality" by extending the benefit of the exception to the plaintiff. Id. at 736. The separability clause in *Mathews* was distinguishable from IRC § 7852(a), because it specifically indicated that the exception (rather than the general rule) should be eliminated if the exception "is held invalid." Id. at 734 (quoting Social Security Amendments of 1977, § 334(g)(3), Pub. L. No. 95-216, 91 Stat. 1509, 1547, note following 42 U.S.C. § 402 (1976 ed., Supp. V)). Nevertheless, it is interesting that the Court assumed that a finding of an equal protection violation would mean *the exception* had been "held invalid."

Many ad hoc provisions—including the vast majority (if not all) of those contained in the 1986 Act—are not codified in the Internal Revenue Code. Section 7852(a), taken literally, would not apply to those provisions, and the 1986 Act did not contain its own separability clause. Thus, the above discussion, concerning the effect of a separability clause on the choice of remedy for an equal protection violation, appears irrelevant as to those ad hoc provisions. In *Alaska Airlines* the Court, under similar facts, managed to avoid deciding whether a separability clause was applicable. The interesting point, however, is that the Court did not appear to consider the argument that the clause applied to be frivolous. Perhaps one could construct a plausible argument that IRC § 7852(a) demonstrates that Congress generally desires separability in tax legislation, and that this general intent should be sufficient to overcome the rather technical analysis of why § 7852(a) would not apply if taken literally. On balance, however, it appears that the separability clause should not apply.

In any event, the absence of an applicable separability clause does not create a presumption against separability. *Alaska Airlines*, 480 U.S. at 686.

[215] Had it not been repealed, the special provision for contributions to the athletic programs of two universities would be a good example of a permanent ad hoc provision. See note 9.

[216] Linkletter v. Walker, 381 U.S. 618, 629 (1965).

[217] 404 U.S. 97 (1971). For an important application of *Chevron*, see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87-88 (1982) (making invalidation of grant of jurisdiction to bankruptcy courts prospective only). For a thorough collection of Supreme Court cases addressing issues of retroactivity, see Annotation, United States Supreme Court's Views as to Retroactive Effect of its Own Decisions Announcing New Rules, 65 L. Ed.2d 1219 (1980).

not clearly foreshadowed."[218] Second, the Court " 'must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' "[219] Finally, the Court will consider whether retroactive application would " 'produce substantial inequitable results.' "[220]

The first *Chevron* factor justifying nonretroactivity probably exists here, since a decision that an ad hoc provision was unconstitutional would not have been "clearly foreshadowed."[221] Application of the second factor, however, would seem to favor retroactivity. The purpose of "the rule in question"—that is, a rule that ad hoc tax provisions may violate the equal protection guarantee or the tax uniformity clause—would best be served by the providing of a remedy for the constitutional violation. In many cases, the ad hoc provision must be eliminated retroactively, if it is to be eliminated at all. As to the third factor, if retroactivity produced any inequity by damaging reliance interests of the beneficiaries of ad hoc provisions,[222] that inequity would pale beside the alternative inequity of allowing a constitutional violation to go without a remedy.

The Court has described the nonretroactive aspect of *Chevron* as an exception to the general rule.[223] On balance, the *Chevron* factors do not seem to justify nonretroactivity in a case where the only meaningful way to eliminate an unconstitutional ad hoc provision is retroactively.[224]

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[218] *Chevron Oil Co.*, 404 U.S. at 105 (citations omitted).

[219] Id. at 105-106 (quoting Linkletter v. Walker, 381 U.S. at 629).

[220] Id. at 106 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

[221] Suppose, however, that Congress enacted new ad hoc tax provisions *after* the Court had issued an opinion declaring certain ad hoc provisions unconstitutional. The first *Chevron* factor would not, of course, favor nonretroactive application of a decision that the new provisions were unconstitutional.

[222] In many cases, there will be no significant reliance on the ad hoc provision. Typically, the justification for an ad hoc provision is that the taxpayer had committed itself to a project in reliance on the continuation of prior law. In that case, the only reliance was on prior law (precisely the kind of reliance which was not protected for taxpayers without their own ad hoc provisions), *not* on the ad hoc provision.

[223] Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987).

[224] The beneficiaries of ad hoc provisions might contend that retroactive elimination of the provisions would violate their due process rights. The law concerning due process challenges to retroactive legislation is instructive here. The Supreme Court has held that such challenges to economic legislation should be analyzed under a rational basis standard: "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). The Court has rejected a number of due process challenges to retroactive tax legislation. See, e.g., United States v. Hemme, 476 U.S. 558 (1986) (involving retroactive change in the gift and estate tax laws); United States v. Darusmont, 449 U.S. 292 (1981) (per curiam) (involving retroactive change in the minimum tax laws); Welch v. Henry, 305 U.S. 134 (1938) (involving Wisconsin income tax law, enacted in 1935, imposing

B. A More Drastic Remedy: Total Invalidation

The plaintiffs in *Apache Bend* proposed a more drastic remedy than either extension or elimination of the 1986 Act's private transition rules. They argued that passage of the 1986 Act was made possible only by the votes secured by private transition rules. They claimed that if the 1986 Act would not have passed but for the unconstitutionally discriminatory provisions, then the only appropriate remedy would be to declare the entire Act a nullity, with the result that pre-1986 law would continue in force.[225] Basically, the argument is that the remedy should be to make the law what it would have been if Congress had realized it could not draw the unconstitutional distinctions, and that the circumstances of the 1986 Act were such that there would have been no 1986 Act without the unconstitutional distinctions.

Some support for this argument can be derived from the Supreme Court's frequently repeated statement: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[226] The Court's statement implies that, if it *is* evident that Congress would not have enacted the Tax Reform Act of 1986, independently of the unlawful discriminations caused by the ad hoc provisions, then the invalid discriminations may not be severed from the rest of the Act; instead, the entire Act must be invalidated.

The Court's consideration of separability in the recent case of *Alaska Airlines, Inc. v. Brock*[227] indicates that a detailed examination of an act's legislative history can be undertaken in order to determine whether an

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tax on dividends received in 1933). In fact, the Court has never sustained a due process challenge to a retroactive change in the income tax laws. (There are, however, a few old cases sustaining due process challenges to retroactive federal transfer tax provisions. See, e.g., Untermeyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927) (plurality opinion); Nichols v. Coolidge, 274 U.S. 531 (1927).) Under the lenient rational basis test, it is probable that Congress itself could retroactively eliminate ad hoc tax provisions; retroactive elimination would be rationally related to the legitimate purpose of correcting the unfairness of the ad hoc provisions. (Moreover, as discussed in note 222, in many cases the beneficiaries of the provisions will not have detrimentally relied on the existence of the provisions; absence of reliance would greatly weaken any argument that retroactivity was "harsh and oppressive." Welch, 305 U.S. at 147; quoted in *Pension Benefit Guaranty Corp.*, 467 U.S. at 733.) If it would be constitutionally acceptable for Congress to eliminate the provisions retroactively to promote fairness, it should certainly be acceptable for the Supreme Court to do so in order to provide a meaningful remedy for a violation of equal protection or of the uniformity clause.

[225] Plaintiffs' brief at 63-80, Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285 (N.D. Tex. 1988).

[226] Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932) (quoted in Buckley v. Valeo, 424 U.S. at 108, and Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)); accord Regan v. Time, Inc., 468 U.S. 641, 653 (1984); INS v. Chadha, 462 U.S. 919, 931-32 (1983); United States v. Jackson, 390 U.S. 570, 585 (1968).

[227] 480 U.S. 678 (1986).

act would have been passed without its unconstitutional provisions.[228] As previously discussed, there is evidence that the ad hoc provisions were important, arguably even essential, to passage of the Act.[229]

Although the above discussion indicates that a colorable argument can be made for striking down the entire Tax Reform Act of 1986 if its ad hoc provisions are held to be unconstitutional, in fact there is very little chance that a court would actually adopt such an extreme remedy. Rejection of the argument for invalidation of the entire 1986 Act is consistent with current judicial attitudes towards separability. The Supreme Court has repeatedly stated that a "court should refrain from invalidating more of the statute than is necessary."[230] It is difficult to see the necessity of invalidating the entire 1986 Act to cure the unconstitutionality of its ad hoc provisions.

It seems grossly disproportionate to invalidate an entire tax act because of ad hoc provisions representing approximately two-tenths of 1% of the total revenue to be generated by the Act.[231] Moreover, the extreme disruption that would be caused by invalidation of the 1986 Act, and the consequent return to pre-1986 law, would make any sensible judge unwilling to invalidate the entire Act. What the Supreme Court stated almost a century ago in *Field v. Clark* remains true today:

> Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country.[232]

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[228] Id. at 691-96.

[229] See note 119, and text accompanying notes 14-16.

[230] *Alaska Airlines, Inc.*, 480 U.S. at 684; *Regan v. Time, Inc.*, 468 U.S. at 652 (plurality opinion) (both quoting El Paso & Northeastern R. Co. v. Guttierrez, 215 U.S. 87, 96 (1909)). See generally Sands, Statutes and Statutory Construction § 44.20 (4th ed. 1986) (stating the tendency of the courts has been towards greater liberality in finding the invalid portions of statutes to be separable).

[231] The statistic is from Senator Packwood. 132 Cong. Rec. S13,786 (daily ed. Sept. 26, 1986). The observation on the incongruity of invalidating the entire 1986 Act because of the unconstitutionality of such a small part of it is from Doti, note 4, at 92.

[232] Field v. Clark, 143 U.S. 649, 696-97 (1892). The Court held that, if a provision in a tariff act providing for the payment of bounties for sugar production was unconstitutional, the unconstitutional provision would be severed from the rest of the act, so that the portions of the act imposing customs duties would remain in effect. Id. at 694-97. It is worth noting, however, that three years later, in Pollock v. Farmers' Loan & Trust Company, 158 U.S. 601 (1895), the Court struck down an entire income tax statute because of the unconstitutionality of the portion of it imposing tax on the income from property. Id. at 635-37. The Court explained that the result of severing the unconstitutional elements of the tax would be that "what was intended as a tax on capital would remain in substance a tax on occupations and labor." Id. at 637. The Court could not "believe that such was the intention of Congress." Id.

Perhaps replacing the 1986 Act with pre-1986 law would not be "disastrous to the financial operations of the government," given the supposed revenue neutrality of the 1986 Act.[233] It would certainly, however, "produce the utmost confusion in the business of the entire country." Each of the millions of taxpayers would have to compute his tax liability under a tax law very different from the law he had every reason to believe would apply. Even if the two tax systems were revenue neutral from the government's standpoint, they would certainly not be revenue neutral to most taxpayers; some would pay much more under pre-1986 law, and some would pay much less. The nationwide confusion and disruption that invalidation of the entire 1986 Act would cause, both to taxpayers and to the Service, could scarcely be exaggerated. Even if the invalidation of the 1986 Act were made prospective only, the disruption would be tremendous. No responsible court would order such a "remedy," given the much less disruptive solution of simply eliminating the 1986 Act's ad hoc provisions.

The argument for invalidating the entire Act becomes even weaker if the ad hoc provisions are considered individually, rather than as a group. In any given case, the relevant question should not be whether Congress would have passed the 1986 Act without the ad hoc provisions as a group; rather, the question should be whether Congress would have passed the 1986 Act without the provision creating the discrimination challenged in that case. If, for example, the challenge involved the investment tax credit, then the separability question is whether the particular investment tax credit ad hoc provisions held to be unconstitutional were crucial to the passage of the Act. Obviously, it is much harder to argue that passage of the Act was dependent on just those few ad hoc provisions, than to argue that passage of the Act was dependent on the Act's ad hoc provisions as a whole.

In sum, although a colorable argument can be made for invalidating the entire 1986 Act (and returning to the pre-1986 version of the Internal Revenue Code) if an ad hoc rule in the Act is held unconstitutional, it is virtually inconceivable that such an argument would prevail. No court with any sense would disrupt the nation's entire tax system merely to remedy the discrimination caused by an ad hoc provision. Moreover, current judicial attitudes towards separability make a finding of nonseparability highly unlikely.[234]

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[233] According to official estimates, the total revenue raised under the 1986 Act differed only slightly from the total revenue which would have been raised under the pre-1986 tax laws. Staff of Joint Comm. on Taxation, note 212, at 1358.

[234] If a separability clause were applicable, that would be an additional reason for not invalidating the entire Act. The Supreme Court has stated that the presumption in favor of separability created by a separability clause means that "unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the stat-

V. Possible Bars to Consideration of the Merits

Despite the existence of nonfrivolous arguments against the constitutionality of ad hoc tax provisions, it is not entirely clear that a litigant could convince a court to consider the issue on its merits. If a court determined that the appropriate remedy for an equal protection or uniformity clause violation was to extend the benefits of the ad hoc provision to all similarly situated taxpayers, including the plaintiffs, then there would be no difficulty in reaching the merits. In that case, resolution of the constitutional issue would have a direct effect on the plaintiff's tax liability. Consequently, the issue could be raised in either a refund suit in district court or Claims Court, or in a suit in Tax Court to determine the taxpayer's tax liability.[235] (Similarly, if a court decided that the proper remedy was a return to pre-1986 law, a taxpayer whose tax liability would be lower under pre-1986 law could raise the constitutional issue in a refund suit or in Tax Court.[236]) As discussed above, however, the most likely remedy for a constitutional violation in this situation would be not an extension of the special benefit to the plaintiff, but a denial of the special benefit to the favored taxpayer.[237] This creates two obstacles to reaching the merits of the constitutional issue: First, the anti-injunction provision[238] may not permit a court to order the Service to deny tax benefits to third party taxpayers; and, second, the plaintiff may not have standing to litigate a claim concerning the tax liability of a third party. As the following discussion will show, however, both of these obstacles probably can be overcome.[239]

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ute." *Alaska Airlines, Inc.*, 480 U.S. at 686. (The question discussed in note 214, regarding whether a separability clause has any effect on the choice between an extension and elimination remedy for an equal protection violation, has no relevance here. Regardless of the answer to that question, a separability clause clearly counsels against invalidating an entire enactment because it contains within it an unconstitutional discrimination.)

As discussed in note 214, it appears that there is no separability clause applicable to the ad hoc provisions of the 1986 Act (although an argument to the contrary can be made). Again, however, the absence of such a clause does not create a presumption against separability. *Alaska Airlines Inc.*, 480 U.S. at 686.

[235] The federal district courts and the Claims Court are given concurrent jurisdiction over refund suits by 28 U.S.C. § 1346(a)(1). The Tax Court has jurisdiction over challenges to Service deficiency determinations by reason of IRC § 6214(a).

[236] But see note 252, concerning the limitations of a refund suit or a Tax Court suit as a means of implementing a decision that the proper remedy is a return to pre-1986 law.

[237] See text accompanying notes 204-224.

[238] IRC § 7421(a).

[239] In *Apache Bend*, the government argued there was an additional reason why the court could not reach the merits of the case: that the granting of special favors to a few taxpayers is a nonjusticiable "political question." As the district court's opinion persuasively demonstrates, the government's argument is without merit. 702 F. Supp. 1285, 1292-94 (N.D. Tex. 1988).

A. The Anti-Injunction Act

The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[240] Only a very few cases exist which consider whether the Act applies to suits seeking injunctions requiring the IRS to assess and collect taxes against third parties.[241] Of those few cases which do exist, however, all of the cases but one hold that the Act does not apply.[242]

The opinions holding that the Act does not apply make the obvious point that suits to *require* the Service to assess and collect taxes are not suits to *restrain* assessment or collection, and so are not within the language of the Act.[243] In fact, the language of the Act seems so clearly not to apply to such suits, that additional analysis hardly seems necessary. Nevertheless, courts have also determined that prohibition of such suits is not required by the policy of the Act. According to the Supreme Court, an important policy justification for the Act is "the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference."[244] As one court noted, "[t]hird party suits to compel tax collection as a means to vindicate plaintiffs' rights do not pose the threat of clogging the federal revenue pipeline that taxpayer-sought injunctions would present," because nonfrivolous third party suits are rare.[245] In addition, there is the obvious point that the Act's "concern with protecting the expeditious collection of revenue,"[246] is seriously implicated only by suits to restrain collection, and not by suits to compel collection. Suits to compel collec-

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[240] IRC § 7421(a).

[241] Courts seldom reach the issue, because most such suits are dismissed for lack of standing. Concerning standing, see text accompanying notes 253-285.

[242] The exception is Barrette v. Phoenix Gen. Hosp. Inc., 86-2 U.S.T.C ¶ 9657 (D. Ariz. 1986). The case should have very little precedential value, since it is not officially reported, its discussion of the Act is short and conclusory, and its interpretation of the Act appears to be dictum (since the court had already held that the plaintiff lacked standing).

[243] Wright v. Regan, 656 F.2d 820, 836 n.52 (D.C. Cir. 1981), rev'd on other grounds, 468 U.S. 737 (1984); Eastern Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1284 (D.C. Cir. 1974), rev'd on other grounds, 426 U.S. 26 (1976); Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471, 489 (S.D.N.Y. 1982), aff'd on rehearing, 603 F. Supp. 970 (1985) (renewed motion to dismiss in light of Allen v. Wright, 468 U.S. 737 (1984), was denied), rev'd on other grounds, 885 F.2d 1020 (2d Cir. 1989); Lugo v. Simon, 453 F. Supp. 677, 690-91 (N.D. Ohio 1978); Tax Analysts & Advocates v. Shultz, 376 F. Supp. 889, 892 (D.C. 1974). See also McGlotten v. Connally, 338 F. Supp. 448, 453 (D.D.C. 1972) (plaintiff did not "seek to limit the amount of tax revenue collectible by the United States").

[244] Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974).

[245] *Abortion Rights Mobilization Inc.*, 544 F. Supp. at 489; accord, *Wright*, 656 F.2d at 836 n.52.

[246] South Carolina v. Regan, 465 U.S. 367, 376 (1984).

tion do not "threaten to deny anticipated tax revenues to the Government."[247]

There is another reason why the Act should not apply in this situation. In *South Carolina v. Regan*,[248] the Supreme Court ruled that the Act did not apply to prevent South Carolina from challenging the constitutionality of legislation imposing certain restrictions on its ability to issue tax exempt bonds. The Court concluded that the Act's "purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy."[249] A taxpayer seeking an injunction against assessment or collection of a tax against itself has the alternative remedy of a refund suit, but South Carolina had no such remedy because the State would owe no tax regardless of whether its bonds were taxable or tax exempt. Similarly, if the only appropriate remedy for an unconstitutional ad hoc tax provision is denial of the benefit to the favored taxpayer, then the disfavored taxpayer does not have the alternative of vindicating its constitutional rights in a refund suit, and the Act should be inapplicable under the reasoning of *South Carolina*. Several lower courts had concluded, even before *South Carolina*, that the Act should not apply to suits seeking to force the Service to collect taxes from third parties, in part because the plaintiffs in such cases did not have the refund suit alternative.[250]

In sum, it seems reasonably clear that the Anti-Injunction Act should not serve as a bar to a constitutional challenge to ad hoc tax provisions.[251] This is so, both because such a suit would not be a suit to re-

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[247] *Eastern Ky. Welfare Rights Org.*, 506 F.2d at 1284.

[248] 465 U.S. 367 (1984).

[249] Id. at 378.

[250] *Eastern Ky. Welfare Rights Org.*, 506 F.2d at 1284; *Abortion Rights Mobilization, Inc.*, 544 F. Supp. at 489-90; *Tax Analysts & Advocates*, 376 F. Supp. at 892; McGlotten v. Connally, 338 F. Supp. 448, 453 (D.D.C. 1972). Prior to the *South Carolina* decision, the strongest authority for this position was the Supreme Court's statement, in Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962), that "[t]he manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for a refund."

[251] In addition to an injunction, a plaintiff might seek a declaratory judgment that the ad hoc tax legislation was invalid. Such a remedy would seem to be unavailable according to the literal language of the provision of the Declaratory Judgment Act which states that declaratory judgments are generally not available "with respect to Federal taxes." 28 U.S.C. § 2201 (West Supp. 1989). Although this language is broader than that of the Anti-Injunction Act, a number of opinions have stated that the two acts are coextensive, so that "[i]f suit is allowed under the Anti-Injunction Act, it is not barred by the Declaratory Judgment Act." Perlowin v. Sassi, 711 F.2d 910, 911 (9th Cir. 1983); accord, Investment Annuity, Inc. v. Blumenthal, 609 F.2d 1, 4 (D.C. Cir. 1971), cert. denied, 446 U.S. 981 (1980); *Eastern Ky. Welfare Rights Org.*, 506 F.2d at 1285; Lugo v. Simon, 453 F. Supp. 677, 690 (N.D. Ohio 1978). There is some support for this reading of the Declaratory Judgment Act in the Act's legislative history. *Eastern Ky. Welfare Rights Org.*, 506 F.2d at 1285; *McGlotten*, 338 F. Supp. at 452-53. The Supreme Court, however, has declined to decide whether the two prohibitions are precisely co-

strain the assessment or collection of taxes, and because the plaintiff in such a suit would have no alternative remedy.[252]

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extensive; it has stated only that "the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act." Bob Jones Univ. v. Simon, 416 U.S. 725, 733 n.7 (1974); Commissioner v. "Americans United" Inc., 416 U.S. 752, 759 n.10 (1974). In *South Carolina,* the Court determined the Anti-Injunction Act did not apply, but carefully refrained from deciding "whether we may grant declaratory relief should plaintiff prevail on the merits." 465 U.S. at 370 n.2. Thus, the Supreme Court has left open the possibility that there may be situations in which a declaratory judgment is not available, although an injunction would be permitted. At least two courts have held there are such situations. Government Fin. Officers Ass'n v. United States, 680 F. Supp. 1538, 1543-44 (N.D. Ga.), vacated (upon plaintiff's motion to dismiss action as moot), 686 F. Supp. 901 (1988) (holding that the *South Carolina* exception to the Anti-Injunction Act does not have a parallel in the Declaratory Judgment Act); *Abortion Rights Mobilization, Inc.*, 544 F. Supp. at 490 (holding that, under the facts of the case, the Anti-Injunction Act did not prohibit a suit for an injunction, but that the federal tax exception to the Declaratory Judgment Act did bar declaratory relief).

Thus, there is doubt as to whether a challenger to an ad hoc tax provision could obtain a declaratory judgment as to the law's unconstitutionality. The question seems to be of little or no practical importance, however, as long as the plaintiff can obtain an injunction: "At that point the opportunity for a declaration of rights would be surplusage." *Abortion Rights Mobilization, Inc.*, 544 F. Supp at 490.

252 The district court ruled, in *Apache Bend*, that the Anti-Injunction Act did not apply because:

> This is not a suit which seeks to restrain the assessment or collection of taxes. Plaintiff does not request that taxes not be assessed against them [sic] or any other taxpayer. Nor do Plaintiffs seek to prohibit taxes from being collected against them or any other taxpayer.

702 F. Supp. at 1294. This analysis would be correct if the relief sought by the *Apache Bend* plaintiffs were simply the striking down of the 1986 Act's ad hoc provisions. In fact, however, the plaintiffs requested "a permanent injunction preventing enforcement of the 1986 Tax Act." Id. at 1286; for the argument, see Plaintiffs' brief at 63-80, Apache Bend Apartments, Ltd. v. United States, 702 F. Supp. 1285 (N.D. Tex. 1988). Perhaps the court did not take the requested relief seriously, and merely meant that the only relief it was willing to consider seriously—elimination of the ad hoc provisions— would not restrain the assessment or collection of taxes. (This is suggested by the court's comment that, "if this Court grants an injunction prohibiting the enforcement of the transition rules in the 1986 Tax Act, then all taxpayers will be treated uniformly under the Act." Id. at 1291.) If, however, the court meant that a suit to enjoin enforcement of the entire 1986 Act was not a suit to restrain the assessment or collection of taxes, then it is difficult to understand the court's analysis. An injunction against enforcement of the 1986 Act would necessarily include an injunction against assessment and collection of any tax that would be due under the Act. In *South Carolina*, 465 U.S. at 367 (discussed in text accompanying notes 248-250), the Court appeared to take it for granted that a suit brought by South Carolina to enjoin enforcement of the municipal bond registration requirements of § 103(j)(1) was a suit to restrain the assessment or collection of a tax (although the Court ultimately held the Anti-Injunction Act did not apply because the State had no alternative forum in which to litigate its claim). If the *South Carolina* suit was a suit to restrain assessment and collection, the *Apache Bend* suit must be one as well. See Smith v. Rich, 667 F.2d 1228, 1230 (5th Cir. 1982) ("The § 7421(a) ban against judicial interference is applicable not only to the assessment and collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes.").

The *Apache Bend* court also held that the Anti-Injunction Act did not apply because, as in *South Carolina*, the plaintiffs had no alternative forum in which to seek the requested relief. 702 F. Supp. at 1294-95. This conclusion seems correct, if the relief sought is simply elimination of the ad hoc provisions. See text accompanying notes 248-250. It is probably also correct if the relief sought is invalidation of the entire 1986 Act. Although plaintiffs could seek to

B. Standing

If the appropriate remedy for an unconstitutional ad hoc tax provision is striking down the special benefit of the ad hoc rule, then a constitutional challenge to an ad hoc rule is an attempt by the challenger to litigate the tax liability of a third party. This presents a serious standing problem. This section will consider two possible theories to support standing: equal protection standing and taxpayer standing. It concludes that equal protection standing is probably available, but that taxpayer standing probably is not.[253]

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have their own tax liability determined under pre-1986 law in a refund suit or a Tax Court suit, that alone would not afford them relief from unequal treatment (because they would then be taxed at the higher pre-1986 tax rates, while the beneficiaries of the transition rules would enjoy the lower rates of the 1986 Act). Thus, if the proper remedy for unequal treatment were a return to pre-1986 law, only an injunction could fully implement that remedy.

253 There is a third possible standing theory. A plaintiff in an ad hoc tax provision challenge might claim competitor standing—that is, standing based on economic injury resulting from unfair competition from a competitor receiving the benefit of a special tax provision. A typical allegation in support of competitor standing would be that the favored competitor will be able to use its favored status to sell at lower prices, thus causing the plaintiff to lose profits if it also lowers prices, or to lose customers if it does not lower prices. Although allegations of competitive injury would not be plausible in every case—in some cases, the favored taxpayer would not really be in competition with the plaintiff, or the favored taxpayer would be too insignificant to affect the overall market, or the amount of the benefit would be too small to significantly affect the favored taxpayer's behavior—in some cases, such allegations might be quite credible.

There are four cases—all involving challenges to actions by the Comptroller of the Currency permitting banks to engage in certain nonbanking activities—in which the Supreme Court has upheld claims of competitor standing, thus permitting plaintiffs to challenge the government's treatment of the plaintiffs' competitors. Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970) (per curiam); Association of Data Processing Serv. Orgs. Inc. v. Camp, 397 U.S. 150 (1970). It appears likely, however, that the *Data Processing* line of cases would be distinguished, rather than followed, in a case involving a challenge to ad hoc tax provisions. This conclusion is based on two Supreme Court cases in which plaintiffs argued unsuccessfully that they had standing to challenge the tax exempt status of certain organizations, because of the adverse effect the organizations' exemptions had on the plaintiffs. Allen v. Wright, 468 U.S. 737 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976). Although the cases did not involve claims of competitor standing, they appear highly relevant to the evaluation of claims of competitor standing in the tax area. In each case, the plaintiffs argued that the exempt organizations would cease to engage in conduct harmful to the plaintiffs, if the Service were ordered to withdraw the tax exemptions of organizations which persisted in such conduct. In each case, the Court ruled that the assumptions about the effects of IRS action on the behavior of the organizations were too speculative to support standing. *Allen*, 468 U.S. at 756-61; *Eastern Ky.*, 426 U.S. at 40-46.

The prospects for a successful assertion of competitor standing in a challenge to ad hoc tax provisions seem rather bleak, in light of *Eastern Kentucky* and *Allen*. Even in cases in which allegations of competitive injury to plaintiffs not favored by ad hoc provisions appear reasonable, the allegations will be speculative in much the same way that the allegations in the two Supreme Court cases were speculative; that is, they will depend on assumptions about how the favored taxpayers (and their customers) will respond to the special tax treatment. The crucial point is that the Supreme Court has established an atmosphere of extreme skepticism towards claims of third party standing (i.e., standing to challenge the tax treatment of another party) in

1. Equal Protection Standing

Standing doctrine grows out of the language in article III, § 2, of the Constitution, limiting the judicial power to "Cases" and "Controversies." The Supreme Court has interpreted this to mean that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[254] The difficulty here is with the redressability requirement. If the proper remedy would be elimination of the ad hoc tax provisions, then the plaintiff would enjoy no tangible benefit from the remedy. The lack of potential for tangible benefit to the plaintiff would arguably mean that a court could not redress the plaintiff's injury. Without redressability, there would be no standing.

In fact, however, the plaintiff in such a case would probably satisfy the requirements of what might be called equal protection standing, as enunciated by the Supreme Court in *Heckler v. Mathews*.[255] Mathews, the

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tax cases, when those claims depend on any assumptions—no matter how reasonable—about the behavior of persons not before the Court.

The four Comptroller of the Currency cases are distinguishable, in that they all involved situations in which the suit, if successful, would make it unlawful for certain third parties to compete with plaintiffs. Thus, if a plaintiff in one of those cases were successful, a source of competition would be totally eliminated. By contrast, success in a challenge to favorable tax treatment of a competitor would not eliminate the competitor. Thus the causal link between the challenged governmental action and the plaintiffs' injury was more direct in those cases, than it would be in a tax case. See American Soc'y of Travel Agents, Inc. v. Blumenthal, 566 F.2d 145, 151 (D.C. Cir. 1977) (plaintiff's allegations of competitive injury in tax case too speculative to confer standing; Comptroller of Currency cases distinguished). In terms of speculativeness of injury, an ad hoc tax provision challenge would probably resemble *Eastern Kentucky* and *Allen* more closely than it would resemble the cases in which the Supreme Court permitted competitor standing.

In keeping with the skeptical atmosphere established by the Supreme Court, several lower court cases decided after *Eastern Kentucky* have considered and rejected claims of competitor standing in the tax area. United States Catholic Conference v. Abortion Rights Mobilization, Inc., 885 F.2d 1020 (2d Cir. 1989); *American Soc'y of Travel Agents, Inc.*, 566 F.2d at 145; Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130 (D.C. Cir. 1977); Research Consulting Assocs. v. Electric Power Research Inst., Inc., 626 F. Supp. 1310 (D. Mass. 1986). But see *Apache Bend*, 702 F. Supp. at 1290-91 (containing language which could be read as supporting competitor standing in a challenge to ad hoc tax provisions; however, the discussion as a whole seems more dependent on notions of equal protection standing).

None of this means that a claim of competitor standing in a challenge to an ad hoc tax provision is absolutely doomed to failure. As long as the Supreme Court continues to use a case-by-case analysis, rather than a blanket prohibition of standing, a glimmer of hope remains.

Incidentally, the problem of speculativeness of injury, which makes competitor standing unlikely, has no application to equal protection standing (discussed in text accompanying notes 254-268). In equal protection standing, the injury is simply the condition of being treated unequally by the government. This injury is fully established by the unequal treatment itself; the fact of injury does not depend in any way on how the favored party may respond to the favored treatment.

[254] *Allen*, 468 U.S. at 751.

[255] 465 U.S. 728 (1984).

plaintiff, was a man who made an equal protection challenge to a provision of the Social Security Act, under which he received "fewer benefits than he would if he were a similarly situated woman."[256] The Act contained a separability clause which clearly stated that if the challenged classification should be held to violate equal protection, the remedy would be to deny the favorable treatment to similarly situated women, rather than to extend the favorable treatment to men.[257] The district court had concluded that the separability clause, if valid, would deprive Mathews of standing, because he would derive no personal benefit if the classification were held unconstitutional.[258] The Supreme Court disagreed. The Court reasoned that the injury to a plaintiff in an equal protection case is not the denial of favorable treatment per se; rather, it is the inequality of treatment. Being treated unequally, in violation of the Constitution, is itself a significant noneconomic injury. Thus, the plaintiff in such a case has standing even if the remedy would clearly be denial of favorable treatment to others, because that denial would redress the plaintiff's noneconomic injury of unequal treatment.[259]

Although *Mathews* is the Court's most thorough discussion of equal protection standing, the Court has reached similar results in cases decided both before and after *Mathews*. A typical situation involves an equal protection violation in a state statute, with the Court remanding the case to the state court for a determination of whether the violation should be remedied by extending or eliminating the favorable treatment. The fact that the state court may eliminate the favorable treatment does not deprive the plaintiff of standing.[260]

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256 Id. at 738.

257 Id. at 734.

258 Id. at 736-37.

259 The Court distinguished Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) (see note 252), on the grounds that *Eastern Ky.* involved a situation in which it was speculative whether plaintiffs' injury was caused by government action and could be redressed by a favorable decision. In *Mathews*, "in contrast, there can be no doubt about the direct causal relationship between the Government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered—denial of Social Security benefits solely on the basis of his gender." 465 U.S. at 741 n.9.

260 See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987) (publisher of magazine had standing to make a first amendment challenge to a state sales tax system which imposed a tax on the sale of the plaintiff's magazine but exempted certain other kinds of magazines, even though the state court below had indicated that the remedy for a constitutional violation would be removal of the exemption for the other magazines); Orr v. Orr, 440 U.S. 268, 271-73 (1979) (husband ordered to pay alimony had standing to challenge the constitutionality of state statute under which husbands could be ordered to pay alimony but wives could not, even though state could respond to a determination of unconstitutionality by providing for the possibility of alimony payments by wives). Actually, the reasoning in these cases is somewhat different from that in *Mathews*. The Court in *Orr* made the point that it was unknown how the State would respond to a Supreme Court finding of unconstitutionality. 440 U.S. at 272. Thus, it was possible that the plaintiff would receive a tangible economic benefit, if the State's response were to extend favorable treatment to the plaintiff. The Court's opinion

Under the reasoning of *Mathews*, a plaintiff in an equal protection challenge to an ad hoc tax provision should have standing, even if the remedy for unconstitutionality would be denial of favorable treatment to all. There is a potential problem, however. There is language in the *Mathews* opinion suggesting that the "serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group,"[261] are essentially the injuries of being stereotyped or stigmatized.[262] This language makes possible a narrow reading of *Mathews*, under which equal protection standing exists only if the challenged classification somehow stereotypes or stigmatizes the plaintiff. The potential for stereotyping or stigmatizing is clear in the case of classifications based on race, gender, or legitimacy. It is more difficult to argue, however, that any stereotyping or stigmatizing has occurred in the case of a classification, such as an ad hoc tax provision, challenged under only the rational basis standard. If being burdened by a stereotype or stigma is crucial to equal protection standing, a plaintiff making a rational basis challenge may not have standing.

Most likely, however, the Court would reject such a narrow reading of *Mathews*. The better reading is that the Court naturally mentioned stereotypes and stigmas because most nonfrivolous equal protection challenges involve suspect or quasi-suspect classifications, but that stereotypes and stigmas are not essential to equal protection standing. Rather, the core of *Mathews* equal protection standing is that being disfavored by unconstitutionally unequal treatment is itself a sufficient injury to confer standing; that is true whether or not the unconstitutional classification involves any offensive stereotypes. There is evidence that this broader reading of the case is correct, in the fact that several of the cases cited by the Court in *Mathews* in support of the Court's analysis did not involve stereotypes or stigmas.[263]

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suggests that this possibility of tangible benefit is what gives the plaintiff standing. Id. at 273. *Arkansas Writer's Project* purports to follow the reasoning of *Orr* (rather oddly, in view of the fact that that state court had already indicated that the remedy for a constitutional violation would be to eliminate the favorable treatment of other magazines, 481 U.S. at 227). To the extent these cases depend on the possibility of a tangible economic benefit to the plaintiff, their reasoning is narrower than that of *Mathews*, which provides for equal protection standing even when the plaintiff has no hope of tangible economic benefit. See also Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890, 895-96 (1989) (following *Arkansas Writers' Project*).

[261] *Mathews*, 465 U.S. at 739-40.

[262] Id. at 739.

[263] The *Mathews* Court prominently quoted and cited Justice Brandeis' opinion in Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931) (quoted in *Mathews*, 465 U.S. at 740). That case involved an equal protection challenge to discriminatory administration of a state property tax, as a result of which the tax was imposed on the shares of the plaintiff national bank at a greater rate than that applied to shares of competing domestic corporations. It is difficult to view the case as involving any significant stereotypes or stigmas. The *Mathews* Court also cited Baker v. Carr, 369 U.S. 186 (1962) (cited in *Mathews*, 465 U.S. at 738 n.4), in which the Court held that a state apportionment scheme could be challenged by voters in those

In sum, two versions of *Heckler v. Mathews* equal protection standing are possible. The narrower version would insist that the challenged classification involve a stereotype or stigma; under this version a challenger to an ad hoc tax provision would probably lack standing. The broader, and more reasonable, version would extend standing to all equal protection challenges.[264] Under this reading, of course, a challenge to an ad hoc tax provision presents no standing problems.[265]

It is not entirely clear whether the reasoning of *Mathews* would be extended to support standing with respect to a tax uniformity clause challenge. The argument for extension is simple: If being treated unequally is itself sufficient injury to establish equal protection standing, then being taxed nonuniformly should be itself sufficient injury to establish uniformity clause standing.

There is, however, an argument against extension. This argument would be that *Mathews* standing makes sense in the context of equal pro-

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districts which were underrepresented relative to their populations. Nothing in *Baker* indicated that the malapportionment was attributable to stereotypes or stigmas. The Court also cited Sierra Club v. Morton, 405 U.S. 727 (1972) (cited in *Mathews*, 465 U.S. at 740 n.7), in support of the proposition that noneconomic injuries are sometimes sufficient to establish standing. Dictum in *Sierra Club* indicated that injuries to "[a]esthetic and environment well-being" (405 U.S. at 734) might support standing. The *Sierra Club* sort of noneconomic injury obviously has nothing to do with being stereotyped or stigmatized.

See also *Arkansas Writers' Project*, 481 U.S. at 227. The challenged discrimination in that case did not involve any readily apparent stereotypes or stigmas. (For the reasons discussed in note 260, however, the case does not necessarily support standing in a situation in which it is clear to the Court that the plaintiff has no hope of realizing any tangible economic benefit from the suit.)

[264] Some support for the broader version can be found in 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction & Related Matters, § 3531.9, at 593 (2d. ed. 1984). The authors discussed (in a text written before the *Mathews* decision) equal protection cases finding standing to exist even though the plaintiff would receive no economic benefit if the unconstitutionality were redressed by denying favorable treatment to others. They remarked that the "best explanation" for such cases, "[L]ies in the very nature of equal protection. It can be argued persuasively that equal protection carries with it a personal right not to be subject to discriminatory regulation, even though the same burdens could be imposed if they were spread to others." Id. In their 1989 supplement, they note that their "personal right argument seems to be confirmed by *Heckler v. Mathews*." Id., 1989 Supp. at 126 n.97.5. If these commentators are correct, and *Mathews* standing inheres in "the very nature of equal protection," then obviously such standing exists in the case of a rational basis challenge, just as much as in the case of any other kind of equal protection challenge.

[265] The district court in Apache Bend Apartments, Ltd. v. United States ruled that the plaintiffs had standing under "general standing principles" (as distinguished from taxpayer standing). 702 F. Supp. 1285, 1291 (N.D. Tex. 1988). Although this portion of the court's opinion is confusing, the court seems to be relying primarily on equal protection standing (albeit without citing *Mathews*). The court explained that "if this Court grants an injunction prohibiting the enforcement of the transition rules in the 1986 Tax Act, then all taxpayers will be treated uniformly under the Act." Id. at 1291. (However, the court failed to note, in its discussion of standing, that the plaintiffs were seeking an injunction against enforcement of the *entire* 1986 Act, not just its transition rules. See text accompanying notes 225-234.) The court did not distinguish between the equal protection challenge and the tax uniformity clause challenge in this part of its standing analysis.

tection, because the constitutional guarantees of due process and equal protection apply to "any person."[266] Thus, a person who is treated unequally in violation of these guarantees has suffered a personal injury recognized by the Constitution, and is entitled to standing. By contrast, the tax uniformity clause makes no reference to the rights of individuals; it should be understood as a guarantee of the rights of states, not of persons. In *Knowlton v. Moore*, for example, the Court explained the purpose of the uniformity clause as "the forbidding of discrimination as between the States."[267] If the uniformity clause does not create a personal right to uniform treatment, then there is no basis for uniformity clause standing analogous to equal protection standing.

There is, in turn, a response to this argument. Rights of States are, in the final analysis, meaningful only inasmuch as they create rights in persons within those States. The tax uniformity clause has meaning only as a guarantee that *persons* will not be discriminated against in taxation because of where they happen to be located.[268] If the uniformity clause is so understood, uniformity clause standing should be permitted under the same reasoning as *Mathews* equal protection standing.

On balance, it seems that *Mathews* should be extended to create uniformity clause standing. The argument against extension, however, is not without some force.

2. *Taxpayer Standing*

The district court in *Apache Bend* found the plaintiffs had standing under a theory distinct from equal protection standing. The court held the plaintiffs had taxpayer standing to assert their tax uniformity clause challenge (but not their equal protection claim).[269] As explained below, the court's conclusion was probably incorrect. If, as appears likely, equal protection standing is available to assert both the equal protection and the uniformity clause claims, the probable unavailability of taxpayer standing is of no practical significance. Nevertheless, the issue merits some discussion, because of the favorable attention given to it by the *Apache Bend* court.

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[266] U.S. Const. amend. V; id. at amend. XIV, § 1.

[267] 178 U.S. 41, 89 (1900). Similarly, the Court in *Ptasynski* explained the uniformity clause as arising out of "concern that the National Government would use its power over commerce to the disadvantage of particular States." 462 U.S. at 81.

[268] This is suggested by the passage from Justice Story's *Commentaries*: "Unless duties, imposts, and excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different States, might exist." 1 J. Story, Commentaries on the Constitution of the United States § 957 (T. Cooley ed. 1873), quoted in *Ptasynski*, 462 U.S. at 81.

[269] 702 F. Supp. at 1291-92.

As Professor Tribe has explained, the premise of taxpayer standing is that "a[n] individual may have a sufficient interest, in his or her capacity as a taxpayer, to challenge spending programs of the taxing government, on the theory—or more candidly, the fiction—that a successful suit against such a program can result in some decrease in the litigant's taxes."[270] In the leading case of *Flast v. Cohen*,[271] for example, the plaintiffs had standing as taxpayers to raise an Establishment Clause challenge to the use of federal funds to assist religious schools.

The Supreme Court, in *Flast*, set forth two requirements for taxpayer standing: First, that the taxpayer must "allege the unconstitutionality . . . of [an] exercise[ ] of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution";[272] and, second, that "the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8."[273] With respect to the second requirement, the Court in *Flast* determined that the Establishment Clause was a "specific constitutional limitation" on the taxing and spending power.[274] The Court left open the question of whether any other specific limitations exist in the Constitution.[275]

The *Apache Bend* district court reasoned that the tax uniformity clause was another specific limitation on the taxing and spending power.[276] This appears reasonable, inasmuch as the uniformity provision is in the very same sentence as the grant of the taxing and spending power. The court thus concluded that the plaintiffs satisfied the second prong of the *Flast* test, with respect to their uniformity clause claim. Since the court easily determined that the first prong was also satisfied—because the

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270 L. Tribe, note 88, at 116.

271 392 U.S. 83 (1968).

272 Id. at 102.

273 Id. at 102-103.

274 Id. at 103-104.

275 Id. at 105.

276 702 F. Supp. 1285, 1291-92 (N.D. Tex. 1986). The Court also held that the equal protection component of the fifth amendment's due process clause was not a specific limitation. Id. at 1292. The conclusion concerning equal protection is almost certainly correct, given the Supreme Court's unwillingness to date to find any specific limitations other than the Establishment Clause. See text accompanying notes 283-285. Moreover, the Court seemed to indicate that the due process clause was not a specific limitation in Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982). The Court stated, "The Court [in *Flast*] distinguished *Frothingham v. Mellon* [262 U.S. 447 (1923)] on the ground that Mrs. Frothingham had relied, not on a specific limitation on the power to tax and spend, but on a more general claim based on the Due Process Clause." 454 U.S. at 479. The Court's explanation of *Flast* is not entirely accurate (*Flast* understood Mrs. Frothingham's argument for the unconstitutionality of the challenged spending as being based primarily on the tenth amendment), but the passage is nevertheless indicative of the unlikelihood that the Court would consider the due process clause a specific limitation.

plaintiffs challenged the constitutionality of the 1986 Act as an exercise of the taxing and spending power[277]—the court concluded that plaintiffs had taxpayer standing. Although the court's conclusion has superficial plausibility, it is highly dubious, for two reasons.

First, the court failed to consider whether the plaintiffs' allegations fit the model of taxpayer standing, that the plaintiffs' tax dollars were being spent in an unconstitutional manner.[278] The difficulty, in a case like *Apache Bend*, is in identifying the *spending* necessary to support taxpayer standing. The plaintiffs' argument would have to be that the tax revenue not collected because of ad hoc tax provisions is the equivalent of a direct expenditure for the benefit of the favored taxpayers, for purposes of taxpayer standing analysis. Thus, the plaintiffs' claim would be that the government was "spending" the plaintiffs' tax dollars on a tax break for other taxpayers, in violation of the uniformity requirement.[279] The similarity of tax breaks to actual expenditures is a familiar element of tax expenditure analysis,[280] but it is not at all clear that the Supreme Court would be willing to incorporate tax expenditure analysis into taxpayer standing doctrine.[281]

One problem with such an incorporation is that it would create extremely broad standing to challenge ad hoc tax provisions. Since the basis of such standing would be that the plaintiffs' tax dollars were being "spent" to give a special tax break to a particular taxpayer in violation of the uniformity clause, standing would extend to *all* federal taxpayers, not merely to taxpayers who were themselves denied uniform treatment with

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277 702 F. Supp. at 1291.

278 "[S]o-called taxpayer suits . . . really are challenges to the spending power, not to the taxing power. Such taxpayers do not really object to the taxes levied but to the uses to which they apply." 1 R. Rotunda, J. Nowak & J. Young, note 86, § 2.13, at 124.

279 The Second Circuit recently considered a taxpayer standing claim which raised the issue of whether a tax subsidy qualified as government spending for purposes of taxpayer standing analysis. U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 885 F.2d 1020 (2d Cir. 1989), rev'g 544 F. Supp. 471 (S.D.N.Y. 1982). The case involved a challenge by abortion rights plaintiffs to the Service's grant of tax exemption to various Catholic organizations. The court rejected the claim of taxpayer standing on the grounds that taxpayer standing is available only to challenge actions of Congress, not actions of administrative agencies. Thus, the court did not reach (or even mention) the issue of whether a tax break constitutes government spending.

280 On tax expenditure analysis generally, see S. Surrey & P. McDaniel, Tax Expenditures (1985).

281 In Walz v. Tax Comm., 397 U.S. 664 (1970), the Court upheld the constitutionality of property tax exemptions for churches. In the course of its opinion, the Court distinguished tax exemption from a direct cash subsidy, for purposes of first amendment analysis: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Id. at 675. But see Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.").

the favored taxpayer. It seems unlikely that the Supreme Court would sanction such expansive standing.[282]

There is another, and more fundamental, difficulty with treating an ad hoc tax provision as if it were an actual expenditure. Essentially, the argument in favor of taxpayer standing is that the ad hoc provision should be analyzed as if the favored taxpayer paid taxes under normal rules, but then received a cash grant from the government (equal to the taxes saved by the ad hoc provision). The ad hoc provision must be analyzed in this way, in order to supply the government expenditure on which taxpayer standing depends. The problem is that consistently treating the ad hoc provision as if it were a direct expenditure makes the uniformity clause violation disappear. If the favored taxpayer is thought of as paying taxes according to the same rules as everyone else (but receiving a cash grant others do not receive), there is no violation of the uniformity requirement. The only way taxpayer standing can exist here is if the fiction of a cash grant is used to create the expenditure necessary to establish standing, but then is dropped when considering the merits of the uniformity clause challenge.

Apart from the problem of finding the necessary spending to support taxpayer standing, there is another weakness in the district court's analysis. It is unlikely that the Supreme Court will ever recognize taxpayer standing in suits based on any part of the Constitution other than the Establishment Clause. More than 20 years after *Flast*, the Court still has not identified any other provision which operates as a "specific constitutional limitation" on the taxing and spending power, and leading commentators do not expect it to do so in the future.[283] *Flast* is probably best understood as providing, not true taxpayer standing, but Establishment Clause standing.[284] That is, because of concerns peculiar to the Establishment Clause, the Court has adopted unusually liberal standing rules for Establishment Clause cases. Although the formulation the Court used in *Flast* (specific constitutional limitation on the taxing and spending power) does seem to cover the uniformity clause, the Court would

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[282] In *Allen v. Wright*, the Court rejected the argument that the government's grant of tax exempt status to racially discriminatory schools inflicted a stigmatic injury on black plaintiffs which gave them standing. The Court explained its conclusion:

> If the abstract sigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating. . . . Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). Constitutional limits on the role of the federal courts preclude such a transformation.

468 U.S. at 755-56 (footnote omitted).

[283] 13 C. Wright, A. Miller, & E. Cooper, note 264, § 3531.10, at 650-51.

[284] Id. at 649.

probably find a way not to extend *Flast* to uniformity clause challenges.[285]

In short, the *Apache Bend* court's finding of taxpayer standing was not carefully considered, and was probably wrong. Perhaps the court was seduced by the label: "Taxpayer standing" *sounds* tailor-made for a challenge to ad hoc tax provisions, but in fact it is not.

VI. Conclusion

A plaintiff challenging the constitutionality of an ad hoc tax provision could probably overcome the hurdles of the Anti-Injunction Act and standing. Having done so, however, he would face a difficult battle on the merits. A plaintiff could construct a credible analysis of why the provision violates the equal protection guarantee, but the analysis would require a departure from the extremely deferential rational basis test traditionally applied in equal protection challenges to economic legislation. As long as the challenged provision contained no geographic terms, an attack based on the tax uniformity clause could succeed only in the rather unlikely event that Supreme Court precedent concerning ad hoc legislation under the bankruptcy uniformity clause was extended to the tax uniformity clause.

In short, the current state of the law suggests that a constitutional challenge should probably fail. On the other hand, the issue is not so clear as to be beyond debate; a court sufficiently outraged by an ad hoc tax provision could write a plausible opinion striking down the provision. On balance, however, the *Philadelphia Inquirer* series was a more serious blow against ad hoc tax provisions than any blow the courts are likely to strike.

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[285] Of course, one way of not extending *Flast* to tax uniformity clause challenges would be to find that a tax break does not constitute a government expenditure. See text accompanying notes 278-282. Another possibility would be the development of an argument that the uniformity clause is not a specific limitation on the taxing and spending power, although it is difficult to imagine a convincing argument to that effect. (The district court in *Apache Bend* sensibly rejected the government's argument that the uniformity clause was a "regulation," rather than a "limitation." 702 F. Supp. at 1291-92.) Finally, the Court might reformulate its holding in *Flast*, to make explicit that it applies only to Establishment Clause challenges.